VOLUME V

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 241

SUNKIST GROWERS, INC., ET AL., PETITIONERS,

vs.

WINCKLER & SMITH
CITRUS PRODUCTS CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 20, 1961
CERTIORARI GRANTED OCTOBER 9, 1961

No. 15242

United States
Court of Appeals
for the Ninth Circuit

SUNKIST GROWERS, INC., a Corporation and THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation,

Appellants,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation and RONALD WALKER, Trustee,

Appellees.

Transcript of Record

In ..... Volumes

Volume V

(Pages 1949 to 2424)

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-11-57

The Court: The record will show the jury present in their proper places.

Everybody wants time to look over these figures and restudy and analyze where they are, so we are going to excuse you, Mr. Witness, until Tuesday morning at 10:00 o'clock. We promise to be through with you pretty early Tuesday morning. Don't we? [2205]

* * *

The Court: Let me explain. Counsel for both sides have gone over some of these exhibits that were offered, particularly Exhibit 4, 9, 10, 11, 12, 13, 14, 23, 24, 29, 32 and 33, and they have agreed on a little explanation as to what there figures and material on these sheets are. So by agreement they are attaching this little slip to each exhibit by way of explanation.

This is one of those explanatory things. It is offered in evidence not for any value that it may have, but only insofar as it is of assistance to explain the exhibit. So the clerk will be instructed to cut up the original which he has, which is in sections, referring to the exhibits, and fasten to each exhibit indicated, Exhibit 4, 9, and so forth, [2206] this little explanatory paragraph.

Mr. Fisher: If the court please, as to that, it has been so long ago, I frankly forget what objections there might have been, but if there were any, we would like to have them restated.

The Court: Whatever objections there were, if any, will be preserved and this stipulation will not have the effect of wiping them out.

* * *

The Court: Plaintiff's Exhibit 70 for identification.

(The exhibit referred to was marked Plaintiff's Exhibit 70 for identification.)

Mr. Dixon: May the record show for the benefit of the [2207] jury that Plaintiff's Exhibit 70——

The Clerk: It is not in evidence.

The Court: Are you offering it?

Mr. Dixon: I offer it in evidence, your Honor.

Mr. Fisher: May it please the court, as to a portion of the exhibit, we have no objection. As to that portion of the exhibit which relates to matters other than Valencia orange juice, we object on the ground it is immaterial.

Mr. Dixon: I am very agreeable, counsel, to eliminating all the price lists that may be contended to deal with——

The Court: Can't we just tell the jury that all that is of concern is Valencias? We have got no other price issue in this case, have we?

Mr. Dixon: That is correct.

Mr. Fisher: Well, I would prefer——

The Court: Can it be removed, physically removed?

Mr. Fisher: I think so. On the understanding that those that don't relate to Valencias will be removed, it is all right.

Mr. Dixon: That is agreeable.

The Court: Counsel will do that later. Exhibit 70 is offered in evidence. Is there any objection? It is received in evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 70, was received in evidence.) [2208]

Mr. Dixon: Ladies and gentlemen of the jury, this exhibit consists of the price list covering Valencia oranges as issued by Sunkist for the years 1950—well, you already have the 1951, so it only relates to 1950.

The Court: Counsel will agree between them hereafter on the parts to be removed that don't concern Valencia.

Juror Johnstone: It is probably stupid on my part——

The Court: What's that?

Juror Johnstone: I am probably stupid. If Winckler & Smith did have 5,010 tons of Valencias in the 1951 season, was that included in the 12,000 tons or was that 12,000 additional added? I mean the hypothetical 12,000?

The Court: On the hypothetical proposition, they were assuming that there would be 12,000 tons more added to the tons that they had already processed. You have the figures given you for what they processed in 1949, eighteen or nineteen thousand tons. What was it in 1949, Mr. Dixon?

Mr. Dixon: I beg your pardon, your Honor?

The Court: What was the production of Valencias in 1949? Eighteen or nineteen thousand tons? I think the figure was given you by the accountant. In 1951, the year in question, all this case centers down to the canning year of 1951 that ended January 31, 1952, as I recall, there was some grapefruit and

some lemons and odds and ends. This hypothetical estimation was on the basis that Winckler & [2209] Smith would have received 12,000 tons more of Valencias to can in that season.

Mr. Dixon: That is correct, your Honor. The figures, I think, we 12,780 odd tons, as I recall it, for 1949 of Valencias.

The Court: No, not 12,000.

Mr. Dixon: Yes.

Mr. Williams: That's right, your Honor.

The Court: Then what was the total?

Mr. Dixon: The total processed of all fruit, including grapefruit and lemons, during that year was in excess, as I recall, of 18,000, eighteen or twenty thousand tons.

The Court: Yes.

Mr. Fisher: May the court please, with reference to the question asked by the juror, the witness' statement is, as I understand it, the witness' contention is that that would be an additional tonnage for that year.

The Court: That's right.

Mr. Fisher: On the theory that it was a composite statement.

The Court: That's right.

Mr. Fisher: And then as to that there is a dispute between counsel as to whether that properly reflects it.

The Court: Yes. Specifically, this suppositious estimate is based on an additional 12,000 tons of Valencias. [2210]

Mr. Fisher: And the defendants' position is that the figures really reflect only the 12,000 and not the other.

The Court: But that the issue that we have sort of enjoined here is the defendants' contention that on Exhibit AZ the $25,000 would represent a profit that was made just by canning the 12,000 Valencias.

On 69, the same $25,000 figure is arrived at, but the accountant says that is a composite figure taking together the 12,000 new oranges and what was already worked on, and that the composite would be 25,000 in the red, having wiped out the deficit, in other words, a couple hundred thousand made on that 12,000 tons. That is where the dispute is on the matter. It is one of those things where each man has the same figure.

Mr. Dixon: In other words, your Honor, if I may add this——

Mr. Fisher: Your Honor, I think we shouldn't go into this now.

The Court: I am willing to stop, but you raised the question about the contentions of the parties. I have just tried to state them. Are we satisfied now?

Mr. Fisher: I think that is correct. In other words, the contention of the defendant is that this 25,000 is the alleged profit that would have been made on the 12,000, and that the accountant is in error in saying that it would have [2211] wiped out the loss.

Mr. Dixon: I would just like, with the permission of court and counsel, to add this additional fact, so the jury is not going to get the wrong position

here. I think it is already in the record that the total tonnage of all fruit processed by Winckler & Smith in the fiscal year ended January 31, 1952, was between six and seven thousand tons, as I recall, of all fruits. This computation is based upon the assumption that the 12,000 additional tons of Valencia oranges would be added to the 6,500, or whatever it is, which would equal the total approximate tonnage processed by Winckler of all fruits in 1949.

Mr. Fisher: Mr. Williams directs my attention to the fact that he thinks Hodge testified it was 8,300.

The Court: I think so, too, that the total tonnage in the canning year 1951, as was, was around eight something, because there was grapefruit, a little bit of lemons, not very much, and some Valencias.

Mr. Williams: And navels, in addition to the Valencias.

The Court: Yes. All right. Now we have answered the question. Let's get on with this.

Mr. Dixon: May it be stipulated by and between counsel for the plaintiff and the defendants that TreeSweet processed a total of 20,163 tons of oranges for its fiscal year ending May 31, 1949; 26,428 tons for its fiscal year ending May 31, [2212] 1950; and 21,479 tons for the fiscal year ending May 31, 1951.

The figures for the total amounts processed by TreeSweet under the contract, the documents that are in evidence, and the total production are already in evidence, your Honor.

The Court: That is stipulated now? It is stated as a stipulation. Is it stipulated, Mr. Fisher, whatever it is?

Mr. Dixon: It is further stipulated——

The Court: Now, wait and let's see if this is stipulated.

Mr. Fisher: It is so stipulated.

The Court: All right.

Mr. Dixon: May it be further stipulated by and between counsel that during the fiscal year for TreeSweet ending May 31, 1949, TreeSweet processed a total of 10,976 tons of oranges under the arrangement with Sunkist; that during the fiscal year ending May 31, 1950, for TreeSweet, it processed a total of 21,103 tons under Plaintiff's Exhibit 21?

The Court: Which was a contract with Exchange Orange or Sunkist?

Mr. Dixon: Between Exchange and TreeSweet.

The Court: All right.

Mr. Dixon: And for the TreeSweet fiscal year ending May 31, 1951, TreeSweet processed a total of 18,614 tons under Plaintiff's Exhibit 22.

The Court: What is the contract between TreeSweet and [2213] EOP?

Mr. Dixon: TreeSweet and Exchange Orange.

The Court: One of the processing contracts.

Mr. Dixon: That's right. It is already in evidence.

The Court: All right.

Mr. Fisher: I don't have the exhibit before me, but subject to check it may be so stipulated, and wherever he stated Sunkist, the contract was between Exchange Orange and——

The Court: That's all right.

Mr. Dixon: May it also be stipulated by and be-

tween counsel that for the period ending May 31, 1949, for the fiscal year of TreeSweet, it billed Exchange Orange $17,493.10 for processing oil under its arrangement for the year ending May 31, 1949.

Nothing was billed to Exchange Orange for processing of oil under the TreeSweet fiscal year ending May 31, 1950.

$4,890.83 was billed to Exchange Orange for processing of oil during the fiscal year ending May 31, 1951, by TreeSweet to Exchange Orange under its contract, Plaintiff's Exhibit 22.

Mr. Fisher. Again subject to check.

The Court: That is subject to checking on the number of the exhibit?

Mr. Fisher: Yes.

The Court: Whatever that processing contract exhibit is.

Mr. Fisher: Yes.

The Court: All right. So stipulated. [2214]

Mr. Dixon: Mark this next in order, please.

The Clerk: Plaintiff's Exhibit 71.

(The exhibit referred to was marked Plaintiff's Exhibit No. 71 for identification.)

Mr. Dixon: Plaintiff's Exhibit 71 offered in evidence, the same being an office memorandum of the Exchange Orange Products Company dated August 9, 1950, by Mr. Lindsay of that company to Mr. Finley, and others named thereon, concerning the subject Blend Product by Case-Swayne Co.

Mr. Fisher: May the court please, as to the introduction of this exhibit, the defendants object on

the ground of the statute of limitations, and I think as to that we have a continuing objection, do we not?

The Court: Let me see the exhibit.

(Document handed to the court.)

The Court: The plaintiff doesn't offer this as to any alleged act concerning Case-Swayne, does it; it is offered generally.

Mr. Dixon: That is right, your Honor, to show that there was an arrangement.

The Court: The continuing objection is overruled and the exhibit is received in evidence.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 71.)

Mr. Dixon: I just want to read the first paragraph. [2215]

Mr. Fisher: As to that, then, as I understand it, you are offering it merely for background purposes?

Mr. Dixon: That is right, and as evidence of the general allegations made in the complaint.

The Court: As I understand it, counsel concedes that this is no alleged specific act of damage, Is that it?

Mr. Dixon: That is correct.

The Court: All right.

Mr. Dixon: I am reading, ladies and gentlemen, from the first paragraph of this exhibit:

"Mr. Finley has made arrangements with Case-Swayne Co., of Santa Ana, for them to process EOP oranges and grapefruit into canned sweetened,

blended orange and grapefruit juice, single strength This memo will confirm arrangements made yesterday with Mr. Fred Lurmann of Case-Swayne on the operation they will conduct for us."

Mr. Fisher: Counsel, the date of that letter was August 9, 1950.

Mr. Dixon: Correct.

May it be stipulated, counsel, that under this arrangement, Plaintiff's Exhibit 71, Case-Swayne processed 493 tons of grapefruit, 479 tons of oranges, into canned grapefruit-orange blend?

Mr. Fisher: As to that, we have the same objection, [2216] your Honor, on the statute of limitations; and also the objection of immateriality with respect to the grapefruit.

Mr. Dixon: May it also be stipulated, counsel, that for the processing operations Case-Swayne was paid therefore the sum of $30,480?

Mr. Fisher: Subject to the same objection.

The Court: In other words, it is stipulated, but the objection is made. The objection is overruled and the stipulation will be accepted.

This refers back to the transactions referred to in Exhibit 71?

Mr. Dixon: That is right.

The Court: Processing by Case-Swayne referring to the memorandum of August 9, 1950?

Mr. Dixon: Yes, your Honor, it does.

The Court: All right.

Mr. Dixon: May it be stipulated by and between counsel that during the season 1949 and '50, E. A. Silzle Corporation processed 266 tons of oranges and

275 tons of grapefruit into canned grapefruit-orange blend and was paid therefore the sum of $15,469?

The Court: What were your figures——

Mr. Dixon: On tonnage? 266 tons of oranges and 275 tons of grapefruit.

The Court: All right. [2217]

Mr. Fisher: Subject to the same and continuing objection of the statute of limitations, and subject also to the immateriality of the reference to grapefruit, we will so stipulate.

The Court: The objection is overruled and the stipulation will be accepted.

Mr. Dixon: Mark this 72, please.

The Clerk: I have marked Plaintiff's Exhibit 72 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 72 for identification.)

Mr. Dixon: Plaintiff's Exhibit 72 offered in evidence.

The Court: 72 received in evidence.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 72.)

Mr. Dixon: Ladies and gentlemen, this exhibit contains excerpts from the minutes of the regular executive committee meeting of the Exchange Orange Products Company, held in Los Angeles, California, January 2, 1951, and deals with the distribution of fruit 1950-51. I am reading from the minutes.

The Court: The meeting was held January 2, 1951?

Mr. Dixon: Correct.

The Court: All right.

Mr. Dixon: "Mr. Wilcox reported on the tentative [2218] distribution of fruit for the 1950-51 season. He stated that it is estimated the industry will have 54,000 tons of navels of which the Exchange will handle approximately 36,000 tons. The Exchange Orange Products Company has facilities to handle this fruit without outside help although some juice fruit will be sold to outside processors. The Valencia estimate for 1951 is 485,000 tons eliminated from the industry of which the Exchange will have approximately 325,000 tons. There is then deducted approximately 25,000 tons of low-grade fruit and generally unsuitable for any juice products. As The EOP Company does not have facilities to handle this total volume of fruit, Mr. Wilcox suggested that working agreements be made with reliable outside processors so that the Valencia crop can be handled most efficiently, the price of this fruit to be set at the end of each two weeks period.

"It was recommended that the California Fruit Growers Exchange"—that is now Sunkist—"be authorized to negotiate contracts with independent processors on some equitable basis. Moved by Mills, seconded by Jennings, that the recommendation be approved. Carried." [2219]

Mr. Fisher. As to the exhibit just offered, the defendants have no objection except as to the immateriality of the references to navels.

The Court: All right. You may have the objection, and it will be overruled.

The Clerk: I have marked Plaintiff's Exhibit 73 for identification.

(The document referred to was marked as Plaintiff's Exhibit No. 73 for identification.)

Mr. Dixon: 73 offered in evidence.

The Court: 73 received in evidence.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 73.)

Mr. Dixon: Ladies and gentlemen of the jury, this is an excerpt from the minutes of the regular executive committee meeting of The Exchange Orange Products Company, held in Los Angeles, California, May 1, 1951.

The heading is: "General Foods Fruit and Processing Contracts:"

"The Manager read a proposed fruit contract to be discussed with General Foods Corporation covering their fruit requirements for the Valencia season. In addition to the fruit contract, it is proposed to have a processing contract with General Foods so that the Exchange can use their facilities [2220] in the event General Foods do not need their facilities for their own products. The general form of both of these contracts has ben approved by Farrand & Farrand, the Manager said. The prices and charges for custom packing are to be negotiated with General Foods.

"After some discussion, it was Moved by Jennings, seconded by Mehren, that the management of California Fruit Growers Exchange and The Exchange Orange Products Company negotiate these contracts with the best possible terms. Carried."

The Clerk: I have marked Plaintiff's Exhibit 74 for identification, your Honor.

(The document referred to was marked as Plaintiff's Exhibit No. 74 for identification.)

Mr. Dixon: 74 offered in evidence, your Honor.

The Court: 74 received in evidence.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 74.)

Mr. Dixon: Ladies and gentlemen of the jury, Plaintiff's 74 is an exhibit containing an excerpt from the minutes of the special executive committee meeting of the Exchange Orange Products Company held in Los Angeles, California, June 13, 1951. The subject is "Cold Gold and Harts Processing Facilities." [2221] I am reading from the minutes:

"The manager stated that every effort should be made to put juice into frozen concentrate after July 15. To do this all frozen concentrate facilities should be operated: Cold Gold Corporation and Harts Fruit Products Company, he said, are not going to operate for their own account this season and these facilities will be available to The EOP Company. He stated he has not been in these plants for several years and would look over their facilities but did not want to

do so if it was not desirable to do business with them. It was Moved by Jennings, seconded by Mills, that the manager be authorized to negotiate a contract with Cold Gold Corporation and Hart's Fruit Products Company, on the best terms possible. Carried."

May it be stipulated by and between counsel that a total of 19,758 tons of oranges were delivered by EOP for processing to Bireley's or General Foods under Plaintiff's Exhibit 18? That being the contract previously referred to in these minutes for that year.

The Court: What year is that?

Mr. Dixon: 1951, your Honor.

The Court: Is it so stipulated?

Mr. Fisher: Again, subject to check with the exhibit. [2222]

The Court: All right.

Mr. Fisher: And, again, the understanding that it is being introduced for background purposes.

The Court: It is not an item on which plaintiff is specifically predicating damages.

Mr. Fisher: Yes.

The Court: The stipulation is approved.

Mr. Dixon: May it be stipulated by and between counsel that under Plaintiff's Exhibit 19, the same being the contract dated July 23, 1951, between Hart's Fruit Products Company and Exchange Orange Products Company, covering the processing of oranges into frozen orange concentrate, 3,690 tons of oranges were thus processed?

The Court: 3,690?

Mr. Dixon: Correct.

Mr. Fisher: Again, subject to check, subject to the fact that it is being introduced for background purposes, and the statute of limitations point, it is so stipulated.

The Court: The stipulation is accepted; any objection is overruled.

The Clerk: I have marked Plaintiff's Exhibit 75 for identification.

(The exhibit referred to was marked as Plaintiff's Exhibit No. 75 for identification.)

The Court: Is it offered? [2223]

Mr. Dixon: Offered in evidence, your Honor.

Mr. Fisher: No objection.

The Court: 75 received in evidence.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 75.)

Mr. Dixon: By way of explanation, since this exhibit deals with statistical figures on production of frozen concentrate, this exhibit shows that during the year commencing November 1, 1949, and ending October 31, 1950, Exchange Orange processed 383,733 gallons of frozen concentrated orange juice; that during the period November 1, 1950, to August 31, 1951, Exchange Orange processed 2,427,572 gallons of frozen concentrated orange juice.

Mr. Fisher: So stipulated. [2224]

Mr. Dixon: May it be further stipulated by and between counsel that the United States Department of Agriculture figures and reports for the year end-

ing November 1, 1951, show a total California-Arizona pack of 4,180,000 gallons of frozen concentrated orange juice, 42-degree Brix?

Mr. Fisher: I point out to the jury that with reference to Exhibit 75, the figures there given with reference to frozen concentrated orange juice were 45-degree Brix, whereas in the tables they are apparently 42 degrees.

The Court: All right. Now, what about the proposed stipulation as to gallonage, 4,180,000 gallons?

Mr. Dixon: I wanted to add something further to that, your Honor, before I finished the stipulation.

The Court: All right.

Mr. Dixon: That of the total 2,427,572 gallons of frozen concentrate reported by Exchange Orange to the Department of Agriculture, United States Department of Agriculture, as having been processed during the period commencing November 1, 1950, and ending October 31, 1951, that 1,044,508 gallons of 45-degree Brix were included in the report of Exchange Orange to the United States Department of Agriculture as having been processed by independent processors.

Mr. Fisher: Well, I am unable to stipulate as to that without checking.

Mr. Dixon: Well, I assume that is what it [2225] means.

The Court: Isn't that included in Exhibit 75? It is already in evidence.

Mr. Dixon: It is, your Honor, but I just want it clear to the jury at this time what that exhibit is.

Mr. Williams: Perhaps I could clarify it.

Mr. Dixon: All right.

Mr. Williams: I think we are willing to stipulate this figure of 2,427,000 some gallons includes the gallonage that was produced for Exchange Orange under the processing contract with Hart's, General Foods, and for any others there were who produced frozen concentrate.

Mr. Dixon: That is correct.

Mr. Williams: So that the total figure includes the gallons produced for Exchange Orange, as well as those produced by Exchange Orange.

The Court: Then the last line refers to this 1.004 gallons, because that figure was produced by the independent processors.

Mr. Williams: Under contract for Exchange Orange.

The Court: Is that satisfactory?

Mr. Dixon: It is one million plus.

The Court: 1.0048.

Mr. Dixon: Of the 2,427,572 gallons was processed by the independent processors.

Mr. Williams: For Exchange Orange. [2226]

Mr. Dixon: Yes.

Mr. Fisher: Processed by others for Exchange Orange.

Mr. Dixon: May it be stipulated by and between counsel that during the season 1948-49 the plaintiff purchased no navels from Exchange Orange or Sunkist. It purchased 1,299 tons of navels during the year 1949-50, and 511 tons in the year 1950-51.

That during the year 1948-49 season, the plaintiff

purchased 2,161 tons of Valencias from Exchange Orange or Sunkist; 128 tons during the year 1949-50, and 21 tons during the year 1950-51.

That it purchased no miscellaneous oranges during that period.

And that it purchased 126 tons of grapefruit during the year 1948-49; 208 tons during the year 1949-50; and 192 tons during the year 1950-51.

Mr. Fisher: It is stipulated that the figures given by Mr. Dixon during the respective years and as to the respective varieties read were purchased from Sunkist, and in each case where the year is referred to, it make reference to the year November 1 to October 31.

The Court: So stipulated.

Mr. Dixon: It was purchased by Winckler & Smith. Was that included in the stipulation, counsel?

Mr. Fisher: Yes. I was merely correcting the fact that [2227] he said Exchange Orange.

The Court: All right. Go ahead.

The Clerk: I have marked Plaintiff's Exhibit 76 for identification.

The Court: 76 marked.

(The exhibit referred to was marked Plaintiff's Exhibit 76 for identification.)

The Court: Do you offer it in evidence?

Mr. Dixon: Offered in evidence, your Honor.

Mr. Fisher: No objection.

The Court: Received.

(The exhibit referred to, marked Plaintiff's Exhibit 76, was received in evidence.)

Mr. Dixon: Plaintiff's Exhibit 76, ladies and gentlemen of the jury, is excerpt from minutes of the regular annual meeting of the shareholders of the Exchange Orange Products Company, held in Los Angeles, California, November 21, 1951. It reads as follows:

"Ratification of Acts of Directors and Officers:

"Moved by Lyon, seconded by McLain, that this meeting of Shareholders ratify all the acts of the directors and officers of the Corporation as the same appear on the Minute Book of the Corporation during the past year. Carried." [2228]

The Clerk: I have marked Plaintiff's Exhibit 77 for identification.

(The exhibit referred to was marked Plaintiff's Exhibit 77 for identification.)

Mr. Dixon: Plaintiff offers Exhibit 77 in evidence.

The Court: 77 received in evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 77, was received in evidence.)

Mr. Dixon: Ladies and gentlemen of the jury, this is the last exhibit, and it is excerpts from minutes of the regular committee meeting of the Exchange Orange Products Company, held in Ontario, California, October 16, 1951. It deals with production. I am now quoting from this exhibit.

"Mr. Lindsay, Plant Superintendent, reported on fruit receipts and production during the month of September, 1951. There were 23,500 tons of Valencias processed in Ontario and 23,000 tons processed

by contract processors and under deferred payment sales, making a total of 46,500 tons credited to the Valencia pool during September, the largest tonnage received in recent years. In September, 1950, there were 36,000 tons of Valencias credited to the pool. Solids averaged 131 pounds per ton as compared with 115 pounds last September. Year to date receipts of all varieties totaled [2229] 254,200 tons at the end of September compared with 213,300 tons for the same period last year; 203,000 tons in 1949; and 212,000 tons in 1948."

Mr. Fisher: No objection.

Mr. Dixon: Plaintiff rests, your Honor.

The Court: Subject to the conclusion of the cross?

Mr. Dixon: Yes, subject to the conclusion of the cross-examination. [2230]

* * *

ROBERT HODGE

recalled as a witness herein, having been heretofore duly sworn, was examined and testified further as follows:

Mr. Strachan: I should like to have the copies of Exhibit 69 distributed to the jury.

(Copies of the exhibit were distributed.)

Cross-Examination
(Continued)

By Mr. Strachan:

Q. Have you a copy of Exhibit 69 before you, Mr. Hodge? A. Yes, sir, I have.

(Testimony of Robert Hodge.)

Q. In the third line you have an item reading Winckler & Smith Processing Cost Computed on 1949 Basis, and then interlined in pen, includes $56,417.38 of general and administrative [2234] costs.

A. Yes, sir.

Q. The general and administrative costs that you used throughout this computation for the year 1951 were the general and administrative costs of the year 1951, is that correct? You made an adjustment.

A. Yes, sir.

Q. Those general and administrative costs that entered into your computation were those which actually occurred in the conduct of the Winckler & Smith business in 1951, is that correct?

A. That is true, sir.

Q. And you have not in your computation made any allowance for general and administrative costs which might have been incurred had this mythical 12,000 tons of fruit been processed, have you?

A. I made the assumption there would be little or no general and administration costs had this mythical 12,000 tons of fruit been processed.

Q. That is, your assumption is this, I take it, that even though you increase the tons processed from about 8,000 to about 20,000 tons for the year 1951, there would not have been any increase in general and administrative costs?

A. There might have been very slight, there might have been a little. [2235]

Q. Well, that is your assumption?

A. Yes, sir.

(Testimony of Robert Hodge.)

Q. You know that Winckler & Smith processed and sold little, if any, single-strength Valencia juice in the year 1951?

A. I don't believe they sold any, sir, that they processed. [2236]

Q. So that the general and administrative expenses were attributable, as they occurred on the books, entirely to products other than single-strength Valencia juice? A. Yes, sir.

Q. Now, as I understand it, in working out the costs per ton you allowed a certain amount per ton for ingredients, cans, cartons, labels, drum, sacks, plant expense, totaled those to $32.22 a ton, and then subtracted $1.23 on account of an inventory increase, which you said would require downward adjustment of those costs; is that correct?

A. No, sir. I believe counsel has his figures wrong. I have a total of $34.06 a ton, and if I subtracted from $32 a ton, it would be less.

The Court: You will recall, in arriving at that $34.06 you had some smaller figure, and then you added some $3 a ton, which brought it up to $34.06?

The Witness: I just didn't recall the $32 figure, your Honor. The total figure including everything was $34.06, yes, sir.

Q. (By Mr. Strachan): That included as I understand your testimony, $3.07 on account of general and administrative costs for the year 1949?

A. That is true, sir.

Q. Now, if you multiply the $3.07 for general and

(Testimony of Robert Hodge.)

administrative expense by 12,000 tons, you will not arrive, [2227] will you, at $56,417.28, which is the amount which Exhibit 69 says has been included in your per ton cost?

A. Such a mathematical computation will not result in fifty-six thousand odd dollars, that is right.

Q. That is, 12,000 times that $3.07 would not?

A. That is right, sir.

Q. As a matter of fact, that would result in there having been included as general and administrative costs on the 12,000 tons, $36,840, would it not?

A. $36,840 is correct, sir.

Q. So that is the factor that has been included up there for general and administrative, then, down near the bottom of Exhibit 69 you have three less items, you say the excess of the general and administrative in 1952, of $93,000 over the $56,417.28. Actually what you have included for general and administrative is about $74,000, isn't it, instead of the $93,000?

A. Based on this mathematical computation that we have just gone through?

Q. Yes.

A. Yes, sir, if you wish to add the two.

The Court: Are you referring to yours or to counsel's?

The Witness: To counsel's.

The Court: All right. [2228]

Q. Now, will you please make the substraction of of the 36,840 from the $93,714.49 and tell us what the excess of the G. and A. in 1952 over 1950 would be?

(Testimony of Robert Hodge.)

A. I am sorry, but you are not stating your question very well. You are asking me to subtract 36,000 from 93,000.

Q. That's right. As I understand it, that $3.07 per ton for 12,000 tons, the G. and A. would amount to $36,840. A. That is true, sir.

Q. Now, you make an adjustment for the difference between the amount included there and the total G. and A. for the year ended January 31, 1952, in your computation, don't you? A. Yes, sir.

Q. Now, the amount that was actually incurred in the year ended January, 1952, was 93,714.

A. Yes, sir.

Q. I am asking you to take the difference between that total amount and the aggregate which was included in the multiplication of 36,840.

A. The difference would be $56,974.49.

The Court: Well, what is the difference in the two computations? I don't mean money difference, but I mean what is the explanation, if any, as to the difference between the two? [2239]

The Witness: Your Honor, this $34.06 a ton was merely an attempt to place Winckler & Smith's citrus processing cost on a similar basis to those in the TreeSweet contract. It is not simply a mathematical computation. It is merely an attempt to get what the cost might have been on the same basis as TreeSweet's were in the contract. It is not simply multiplying this by this. It is an attempt to arrive at a similar figure.

If we went further, I testified that plant ex-

(Testimony of Robert Hodge.)

penses were $11.10 per ton. Now, multiplying that out is some 130,000 odd dollars which would be in that computation if you used the same basis that counsel is approaching for general and administration expenses. Now, if we go along those lines, it seems to me a large part of that $130,000 which is in the $34.06 on your basis is also in the cost of sales as shown on Exhibit 65 as $680,845.97.

I did not attempt to compute it because it is too involved, but in my estimation there is a duplication there of over $60,000.

In making up Schedule 69, we merely tried to get what was definitely known and to keep it as simple as possible. We did not try to throw all these varying costs in, these factors such as what is this made up of? It is an attempt to compare the two contracts, different processing costs, so if we are going to throw things back and forth, we can come [2240] up with a much larger figure. This is a conservative figure.

Q. (By Mr. Strachan): Isn't it true that in this factor of $1.51 profit per ton you have general and administrative expenses, $3.07?

A. That is in the computation.

Q. So when you multiply that composite figure by the 12,000, you have included there only the 36,840 of administrative costs, haven't you?

A. I previously told you that mathematically you are correct, sir.

Q. If you subtract that from 93,714 of actual administrative expenses, general and administra-

(Testimony of Robert Hodge.)

tive, in the year ended January 31, 1952, you get a difference of $52,874, don't you?

A. Pardon me. Was that $93,714.49 less $36,840?

Q. Yes, sir. A. No, sir. I get $56,974.49.

Q. 56 of what?

A. $56,974.49. Pardon me. 874.49.

Q. I missed on one figure and you missed on another. A. That's right, sir.

Q. Then if that difference between 1951 general and administrative as it occurred and that which has been included in the multiplication is your unit cost and you were to deduct that $57,000 figure instead of the 37,000 which [2241] you deducted, that would bring the profit down as stated on your exhibit to between five and six thousand dollars instead of $25,031.45, wouldn't it?

A. I told you previously, counsel, I did not include it in the $34.06 as such. The $34.06 as such is merely to try and bring Winckler & Smith's citrus processing cost in line with those under the TreeSweet contract. It is not a mathematical computation. I am merely building up something, trying to get the two comparable. [2242]

Q. Perhaps, I misunderstood your testimony. Referring to page 1895, you say that you put in ingredients at $2.14, cans $15.17, cartons $2.01, labels, drums, sacks, plant expense, and so forth, and then you say, "The inventory increased during this period to the extent of $1.23 a ton, so I subtract that

(Testimony of Robert Hodge.)

from these costs. To these costs I also added general and administrative expenses of $3.07 a ton, which makes a grand total of $34.06 a ton. Taking that from the amount paid TreeSweet for processing gives Winckler & Smith a profit of $1.51 a ton, or a total of $18,120 profit on processing."

Now, that means, does it not, that the allowance of $3.07 a ton for general and administrative expense was mutiplied by the 12,000 and did not come to the total of $56,000 as shown on the face of Exhibit 69, but came, rather, to $36,874?

A. Well, I have told you several times, counsel, I can't see why you keep coming back to this, the $34.06 is a figure. Now, let's take the inventory variation of $1.23. There was no inventory variation of $1.23 in 1952, because at that time the company had little or no inventory. Therefore, how could I get an inventory variation in that figure? It is an attempt to put something on a comparable basis, that is all it is. You cannot multiply this by this, or that by this.

Q. Perhaps, again, I misunderstand, but I thought your testimony was to be understood as meaning that in 1949 there [2243] was an inventory increase, so because you were using 1949 costs instead of 1951 costs, you subtracted the equivalent of that inventory adjustment on the per ton basis?

A. That is true, sir.

Q. You were still using 1949 figures, weren't you?

A. Using '49 figures, '49 costs. We are not multiplying anything; we are merely trying to arrive at

(Testimony of Robert Hodge.)

a per ton cost for processing to compare that with TreeSweet's per ton processing cost.

Q. If that assumption be correct, it would follow that Winckler & Smith's costs in '49 were the same as TreeSweet's costs in '52, is that true?

A. No. I think there is $1.51 difference between my computations of the two costs, counsel.

Q. Going over some of the items of general and administrative expense, you assume that the addition of the 12,000 tons in the processing of single-strength juice would have made no change in the telephone or telegraph costs?

A. Our computation is based on that assumption, but there would have been undoubtedly additional telephone costs, there is no doubt about that.

Q. Now, do you also assume that there would have been no increase in stationery supplies in processing and marketing?

A. We have assumed that in this computation.

Q. There would have been none?

A. There would have been some.

Q. But that is not allowed for in the computation? A. No. It is minor.

Q. What about postage, would there have been added postage?

A. There undoubtedly would have been added postage of some small amount.

Q. That is ignored in the computation?

A. You are looking at small figures here, counsel. Telephone and telegraph was only $1,400, sta-

(Testimony of Robert Hodge.)

tionery and supplies was $3,200, which includes the postage you mentioned.

Had I given weight to all these factors, counsel, it would have taken a Philadelphia lawyer to understand it. This was a computation made as simply as I could possibly make it to bring out a point.

Had I made all these computations that you are asking for——

Q. What about travel expense?

The Court: Just a minute. Let the witness finish.

The Witness: Had I made all these computations that you are asking me for, you would have attacked those, too, so why should we quibble about a few dollars here and there?

The Court: Ask your question.

Q. (By Mr. Strachan): We are not quibbling about a few [2245] dollars; we are quibbling about several thousand, on the basis of your computation.

A. Yes, sir.

Q. How about travel expense?

A. I see no reason for the travel expense to increase very much. The travel expense was very large that year due principally to the Florida operations, which were discontinued in the early part of the year. It would not have been necessary for much traveling for the general administrative staff to sell this 12,000 tons of fruit.

Q. What about bookkeeping?

A. There would have been little or no bookkeep-

(Testimony of Robert Hodge.)

ing costs. The staff was there the whole year and were paid their salaries.

Q. Likewise, you assume for the purpose of your computation that there would be no selling expense involved in disposing of this additional product from the 12,000 tons, other than three per cent brokerage; is that right?

A. No increased selling expense, that is true, sir.

Q. Would there not have been selling expenses, increased selling expenses involved in salaries and commissions?

A. I do not believe there would have been any, sir. Their sales staff was there the whole period.

Q. In 1952?

A. As far as selling—— [2246]

Q. 1951, rather.

A. As far as selling this single-strength juice, it would have sold itself, practically, there is no argument about that. I shouldn't say that. Anyone can argue. The product was in short demand, it was so much sought after that Mr. Winckler actually went out and bought some unlabeled single-strength juice from EOP in order to try and keep one of his customers happy, that is how short in supply the single-strength juice was. There would have been no need to sell it.

The Court: You allowed, however, a brokerage of three per cent on these additional sales?

The Witness: That is right, sir.

Q. (By Mr. Strachan): Did you know that Mr.

(Testimony of Robert Hodge.)

Winckler had testified that the market on single-strength juice declined and declined until it hit two twenty, because of the over-supply from Florida?

Mr. Dixon: If the Court please, that is not relevant it seems to me. The record shows that that was the opening price in June, as I recall it, of Case-Swayne. The ultimate price was two eighty.

The Court: The objection is overruled. Go ahead.

The Witness: I do not know, sir.

Q. (By Mr. Strachan): In connection with the selling, would there have been an increase in the freight charges on [2247] outgoing freight due to the shipment of the added product?

A. There might have been. There probably would have been some increase, certainly.

Q. You made no allowance for that?

A. No, sir. [2248]

Q. What about telephone and telegraph?

A. Again, there would have been additional telephone and telegraph incurred in phoning customers and things like that, undoubtedly.

Q. What as to automobile expense?

A. I don't believe they would have increased any, sir.

Q. What about traveling expense?

The Court: Counsel, you already asked about that.

Mr. Strachan: No. That was under the general and administrative, your Honor. This is selling.

The Court: All right.

(Testimony of Robert Hodge.)

Mr. Strachan: They broke it down between the two general classifications.

The Witness: There would have been little or no increase in the traveling expenses because this travel expense was largely incurred in the Florida operations, a good part of it.

Q. (By Mr. Strachan): The travel expense for the year ended January 31, 1952, in connection with the selling expense was only about $2,400, wasn't it?

A. Pardon me. How do you arrive at the $2,400? I am sorry, but I did not follow you.

Q. From the books of the company.

A. $2,400 for what?

Q. For travel charged to selling expense.

A. In the year ended January 31, 1952?

Q. Yes.

A. No. In the selling expense there is $9,530.56.

Q. What was it in the year ended 1950, January, 1950?

A. I can't see that that is important since I adjusted the computation for the actual in 1952, but the year ended January 31, 1950, the travel expense was $7,166.13.

Q. Now, what about advertising? The advertising expenditures actually made in the year 1951 all related to production of single strength, didn't they?

A. A good part of it, as I previously testified, was spent in 1950 and deferred into 1951 operations, 1951 season.

Q. That didn't relate to single-strength Valencia juice, did it?

(Testimony of Robert Hodge.)

A. No, sir, it did not, sir.

Q. Did you assume that this product would not have to be advertised had it been made?

A. Had it been made, it probably would not have incurred much advertising, no, sir.

Q. So that the advertising allowance of $1.88 a ton under the TreeSweet contract was in effect a profit because Winckler & Smith, according to your computation, wouldn't have spent anything on advertising, is that correct?

A. They would not have spent very much under this computation. [2250]

Q. That means that anything they were allowed for advertising under the TreeSweet basis would have been profit? A. That is true, sir.

The Court: Do you know whether TreeSweet spent $1.88 for advertising?

The Witness: I do not know what TreeSweet did, sir.

Q. (By Mr. Strachan): In your processing cost, have you made any investigation to determine the extent to which the cost of cans, cartons and labels increased between 1949 and 1951?

A. I believe I testified on Thursday or Friday that I did not, sir.

Q. Don't you know that in those three items alone Winckler & Smith's costs increased in the amount of approximately $5.50 per ton between 1949 and 1951?

A. I do not know that, sir.

Q. If that be the fact, on the 12,000 mythical

(Testimony of Robert Hodge.)

tons, there would have been an addition to the processing cost of $66,000, wouldn't there?

A. If that be the fact, sir, certainly.

Q. In your computation you made no allowance, did you, for discounts that Winckler & Smith would have allowed from the selling price?

A. My selling price was based on the same selling price as TreeSweet got for the product, sir, approximately. [2251] For the sake of simplicity, I reduced it from $752,880 to $750,000.

Q. Actually, Winckler & Smith's regular terms of sale allowed a 1½ per cent discount, did they not, from the sales or selling price?

A. I previously told you that I based the selling price on the same price TreeSweet got for it.

Q. Do you know whether that sales price that you say TreeSweet got was before or after the 1½ per cent discount?

A. No, sir. I simply took it from the Exhibit 11, the facts contained in Exhibit 11.

Q. If it is a fact that from that selling price there was allowed a 1½ per cent cash discount, that is not reflected in your computation, is it?

A. Yes, it is reflected in the computation if the same 1½ per cent discount was given by TreeSweet.

Q. If TreeSweet's price that you have assumed would be Winckler & Smith's price was before the discount, then that means that TreeSweet had absorbed a 1½ per cent discount and Winckler &

(Testimony of Robert Hodge.)

Smith's price would have to absorb a 1½ per cent discount, would it not?

A. The computation is based on the net amount TreeSweet realized from the sales, sir, so if TreeSweet gave the discount, then Winckler & Smith gave the discount in this computation. [2332]

Q. But do you know whether that sales price you have used from TreeSweet was before or after the 1½ per cent discount?

A. I know it is from Exhibit 11. That is the amount realized by TreeSweet; whether it is before or after, I do not know, but it is the amount realized. I do not know whether TreeSweet gave any discount.

Q. Do you know that Winckler & Smith gave 1½ per cent discount, don't you?

A. I believe that was customary.

Q. That was his customary basis of sales, wasn't it?

A. No, it was not. I wouldn't say customary, because their discounts are not—their sales are netted, sir, and I assume that TreeSweet's are the same, after discounts and allowances. I mean from the information in Exhibit 11, I took the same figure that was supplied us in this computation as being the—Exhibit 11-G states, "There was paid by TreeSweet in actual dollars the amount of $1,296,031.41 for the orange juice it processed and purchased." I assume the purchase price is a net figure.

Q. That is the purchase price by TreeSweet from Sunkist, isn't it?

(Testimony of Robert Hodge.)

A. Yes, sir, for the canned juice that it processed.

Q. Do you know whether from that list price the discounts [2253] are deducted?

A. I told you, counsel, I did not take the list price. I took the actual amount realized by TreeSweet as shown in Exhibit 11. I do not know anything about TreeSweet's discounts. TreeSweet may have given a 5 per cent discount for all I know.

Q. Do you know that in selling the trade Winckler & Smith customarily allowed another discount called the swell allowance of ¼ of 1 per cent?

A. That is customary. I mean that was Winckler & Smith's custom.

The Court: You took TreeSweet's figure, which was the net amount to TreeSweet, is that right?

The Witness: That's right, sir.

The Court: So as far as you were concerned, it didn't make any difference what allowance TreeSweet allowed?

The Witness: That's right, sir.

The Court: Because whatever they allowed, you took the figure of what they allegedly got?

The Witness: That's right, sir.

Q. (By Mr. Strachan): I call to your attention, if you have it, a copy of Exhibit 20, the processor in this case being TreeSweet. I am talking about the TreeSweet processing contract. [2254]

* * *

Q. (By Mr. Strachan): It says, "The processor agrees to purchase their canned juice require-

(Testimony of Robert Hodge.)

ments from California Fruit Growers Exchange at the Exchange price in effect at the time of purchase less label allowance," and other allowances that are specified, and what you have used here as the amount paid to Sunkist is really the purchase price of the juice, and the contract does not specify the selling price by TreeSweet.

A. Sir, I don't think you are being fair. If you will read the paragraph further, it also reads: "Any Exchange discounts and rebates under [2255] price protection agreements, other than swell allowances, brokerage, cash discount, and label allowances allowed by the Exchange to any of its buyers will also be made available to processor."

Q. That has to do, however, with the price that the processor pays Sunkist. It doesn't have to do with the pricing or the discounts that are allowed by the processor when it resells the juice to its customers?

Mr. Dixon: Counsel, may I interrupt? Your Honor, it seems to me the contract speaks for itself. This witness has already testified that he took that into consideration. In other words, the figures used were assumptions that Sunkist also gave to TreeSweet the discounts that it gave any other purchaser, in addition to which it gave the discounts allowed in the contract, because the contract requires them to do so. As the witness has already pointed out, he took those into consideration and assumed that Sunkist gave them to them because the contract required them to do so. [2256]

(Testimony of Robert Hodge.)

Mr. Fisher: Mr. Dixon, I think you are in error in your interpretation of the language of the contract.

Mr. Dixon: The contract provision will speak for itself.

The Court: Certainly I don't think you should cross-examine an accountant on the legal meaning of a contract. He has told you what he did.

How much longer will you be on this cross-examination?

Mr. Strachan: Perhaps 10 minutes.

Mr. Dixon: May we have that provision read to the jury, your Honor, so that the jury can understand the witness' last answer?

The Court: I am not sure that I know what it means, either.

It starts out, "Processor agrees to purchase"—this is TreeSweet—"their canned fruit requirements from California Fruit Growers Exchange at the Exchange price in effect at the time of purchase, less * * *"

Mr. Dixon: Then further on I think the contract also provides in the same provision that those discounts shall be in addition to the discounts allowed by Sunkist to any other customer. And that is the point this witness was making.

The Court: This Exchange price referred to, I suppose, is the price at which Exchange was selling canned juice to the trade; is that right?

Mr. Strachan: Yes, that is my understanding.

The Court: I suppose that although this contract did not in so many words tell TreeSweet what

(Testimony of Robert Hodge.)

it should sell juice for, since it was competitive to Exchange, it probably had to sell at about the same price?

Mr. Fisher: No, sir.

Mr. Strachan: No, I don't think that that is what the contract provides for, your Honor. Because when the goods are sold in the trade, the resale by the trade, as you might call it, to their customers isn't at a price that is fixed by Sunkist at all. It is fixed by economic and other such factors.

The Court: I wasn't getting at that. I was getting at what TreeSweet got for this juice.

Exhibit 11 was the result of what TreeSweet got, was it not?

Mr. Dixon: If the Court please, may I interrupt for just a moment? Mr. McCracken of TreeSweet testified, I am certain the record will so show, that the sales were made by TreeSweet in accordance with its published list, price list, which is already in evidence, which is the same as the Sunkist price list, which is also in evidence, both of which provide for these discounts that the witness has testified to. And in addition thereto, my recollection is that Mr. McCracken testified that all the sales were made at the Sunkist selling price by TreeSweet. [2258]

The Court: I haven't made myself clear to counsel, either.

What is this Exhibit 11? Was it the result of a subpoena?

Mr. Strachan: Yes, sir.

(Testimony of Robert Hodge.)

The Court: What does it provide—what TreeSweet got in dollars?

(Document handed to the Court.)

The Court: Mr. Fisher.

Mr. Fisher: Your Honor, I think the question is a matter of interpretation of the sentence starting, "Any Exchange discounts and rebates under price protection agreements, other than swell allowance, brokerage, cash discount and label allowance, allowed by the Exchange to any of its buyers will also be made available to processor."

In other words, discounts other than swell allowance, brokerage, cash discount——

The Court: Are you going to contend that there were such other allowances made to TreeSweet?

Mr. Fisher: Well, I don't know that there were.

The Court: But my question is, does Exhibit 11 show——

Mr. Strachan: As I understand the fact, your Honor, there were no additional allowances made there. That provision of the contract, therefore, had no actual effect on the transaction.

The Court: Then let's forget about it. But now my [2259] question is, does Exhibit 11 show what TreeSweet got?

Mr. Strachan: What they got for their product?

The Court: What they got for their product?

Mr. Strachan: No, sir.

Mr. Dixon: No, it does not.

(Testimony of Robert Hodge.)

Mr. Strachan: What the witness has picked up and used as TreeSweet's gross sales, I take it, is this: There was paid by TreeSweet in actual dollars the amount of $1,204,031.41 for the orange juice it processed and purchased. That relates entirely to TreeSweet's purchase price and does not relate to the amount realized by TreeSweet from the resale.

The Court: The witness has picked up, then—has taken the figure of what TreeSweet paid and not what TreeSweet sold for?

Mr. Strachan: That is right.

The Court: Then the witness has taken the most conservative figure that he could take, because he has taken the figure of $750,000 as a selling price, when actually it was, you tell me, a cost to TreeSweet. Is that right?

If TreeSweet then sold this juice for $850,000—well, let's leave it this way: The witness says he got his figure from Exhibit 11, we are all agreed what Exhibit 11 shows what TreeSweet paid for the product.

Mr. Strachan: That's right.

The Court: All right. [2260]

Any objection will be overruled. Let's have another question and wind up this cross-examination.

Mr. Dixon: May we have the last question and answer read, your Honor?

The Court: It is pretty far back. Let's start over.

(Testimony of Robert Hodge.)

Mr. Dixon: All right. I will withdraw my request.

Q. (By Mr. Strachan): In your computation what did you assume would be the return to Sunkist for oil produced by Winckler & Smith in processing this hypothetical 12,000 tons?

A. There was no such computation made, sir.

Q. What?

A. There was no such computation made. I assumed that Winckler & Smith would turn out—back whatever oil it produced to Sunkist, as did TreeSweet.

Q. And did you also assume that the realization of oil by Winckler & Smith would be the same as the realization by TreeSweet?

A. No, sir, I made no such computation as to the amount that Winckler & Smith would have produced from these 12,000 tons. No computation was made, because as I understand the contract TreeSweet and/or Winckler & Smith, had they had such a contract, would have turned over whatever oil was produced back to Sunkist.

Q. Would you assume that the same quantity of oil or the same value of oil would be returned by Winckler & Smith [2261] as was returned by TreeSweet?

A. I previously told you I made no such computations, sir.

The Court: I will sustain an objection, counsel, to this line of questioning on a comparison made by the witness.

(Testimony of Robert Hodge.)

He brought out the fact that he didn't compute it, and he based it on the fact that the oil would be returned. What the difference was would not make any difference in this computation, which is not a computation as to what Sunkist would have got; it is a computation as between TreeSweet and the plaintiff on this mythical tonnage.

Q. (By Mr. Strachan): Would you want the jury to understand that under the terms of the TreeSweet agreement Sunkist would have realized for the juice and for the oil as much from Winckler & Smith as they did from TreeSweet?

The Court: Counsel, I told you the question was improper. Now you have asked the question again. There has to be an end to cross-examination. A court has a right to determine what is proper and what is not proper.

Is there any difference between the question you just asked and the one I told you that I would sustain an objection to as not proper?

Mr. Strachan: I was trying to find out from the witness whether he had made an assumption that the Sunkist would come out as well under the TreeSweet contract in Winckler's hands [2262] as it did——

The Court: No. 1, he already has told you that he did not make the computation. Secondly, he has told you that he assumed that TreeSweet was turning the oil back, and that plaintiff was turning the oil back, and I have told you that we are not comparing what Sunkist would get. We are making a

(Testimony of Robert Hodge.)

comparison—the witness has testified to a comparison between TreeSweet and the plaintiff.

You are outside the scope of cross-examination. Some other witness who testified to this, you might cross-examine, but not this witness.

At least I don't know of any testimony this witness gave about computations about oil. If there is, it doesn't involve this exhibit. It involves some other testimony.

Mr. Strachan: I was talking about Exhibit 67.

The Court: 69?

Mr. Strachan: No. Exhibit 67.

The Court: Maybe I misunderstood, counsel. I never have understood that we left 69 until just this minute.

If you asked any question about 67 heretofore, I apologize to you. If you have previously mentioned 67 I apologize. If not, as I saw the record——

Mr. Strachan: I don't know whether I mentioned 67, or not, but I had gone back to 67 and was going back into the subject of the oil yield.

The Court: Then we understand each other and we are not talking about 69, computations that we were heretofore discussing.

Proceed.

You had better ask your question again to save time.

Mr. Strachan: All right. Referring to Exhibit 67, the third page, you show cost of the juice to TreeSweet was $4.29, and the oil and peel was $10.81. Oil and peel was what was realized by Tree-

(Testimony of Robert Hodge.)

Sweet and accounted for by TreeSweet to Sunkist, was it not?

The Witness: I believe the oil and the peel, sir, were to be turned over to Sunkist, that is true, sir.

Q. (By Mr. Strachan): So this reflects the worth of the oil and peel to Sunkist that was turned over?

A. That is true, sir, that is my computation.

The Court: Exhibit 67, you will recall, ladies and gentlemen, was the computation of what TreeSweet was paying, according to the witness' computations, for the juice, and then the figure for the oil, and the total amount that Sunkist obtained from the oranges. There was a similar exhibit, 66, I think it was, involving Silzle. Now counsel is referring to the TreeSweet, Exhibit 67.

Q. (By Mr. Strachan): Have you made a computation to show how the oil and peel, which would have been returned to Sunkist by Winckler & Smith, would compare with the oil [2264] and peel returned by TreeSweet?

A. No, sir, I have not made any such computation.

Q. The return of oil by TreeSweet was at approximately the rate of four pounds per ton, was it not?

A. Yes, sir, that is approximately correct.

Q. Do you know what the production of oil per ton was by Winckler & Smith according to Mr. Winckler's testimony?

(Testimony of Robert Hodge.)

A. From these mythical oranges? No, sir, I couldn't begin to estimate it.

Q. I believe Mr. Winckler testified that it was between a pound and a half and two pounds per ton that he would have realized of oil?

A. That I do not know, sir. [2265]

Q. So you have not made any computation as to what the loss to Sunkist would be if Winckler & Smith were to process these, because of the fact that its production of oil was less than half the rate of TreeSweet's production of oil?

Mr. Dixon: Now, just a moment. I object to that question, your Honor, as being completely outside the scope of direct examination.

The Court: Overruled. It has already been answered.

The Witness: Several times.

The Court: Has it, Mr. Witness?

The Witness: Several times, sir.

The Court: That's the end of that. The witness has made no such computation. Ask another question.

Mr. Strachan: That's all of the cross.

* * *

(Testimony of Robert Hodge.)

Redirect Examination

By Mr. Dixon:

Q. Mr. Hodge, you were asked on cross-examination concerning your inquiry of the RFC concerning the status of Winckler's & Smith's loan, and testified concerning a reply to your request from the RFC dated August 2, 1951. I hand you [2266] what has been marked for identification as Plaintiff's Exhibit 78 and ask you if that is the reply that you received concerning which you gave testimony.

A. That is the reply, sir.

Mr. Dixon: 78 offered in evidence, your Honor.

The Court: Received in evidence, Exhibit 78.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 78.)

Mr. Dixon: I believe Exhibit 69 is not yet in evidence, your Honor. I accordingly offer Plaintiff's Exhibit 69 for the sole and only purpose of indicating the manner and the figures used concerning which this witness has testified as to the basis of his opinion concerning the difference in results in the operations of Winckler & Smith for the fiscal year of that company ended January 31, 1952, had Valencia oranges been available to it during the processing season of 1951 on the same or comparable basis to that on which they were made available to Tree-Sweet.

Mr. Strachan: I don't understand the limitation expressed.

(Testimony of Robert Hodge.)

The Court: The limitation is one of these—I assume it is that it is merely one of these explanatory things, not direct evidence. It is only illustrative, similar to other exhibits. Is that satisfactory? It will be received——

Mr. Strachan: There is one thing I want to call your [2267] attention to. I think it is improper for the witness to have the exhibit contain items called Winckler & Smith damage, and I think the jury should be instructed that doesn't mean damage.

The Court: Yes. We will strike that out at this time. Let's have it.

Mr. Strachan: It appears twice in the exhibit.

The Court: Let me have one of them.

The Clerk: The jurors have them.

The Court: Well, there is a copy here that is conformed. I will use the copy I have and we will explain this. Do you have Exhibit 69?

The Jurors: Yes.

The Court: 69 is being admitted in evidence, but some changes are going to made in it. It is not direct evidence. It is one of these exhibits that is a computation. It is illustrative. You gentlemen and ladies can yourselves make computations, if you want to, but the exhibit is illustrative of the witness' opinion. This witness has given some opinion testimony and this is illustrative of his opinion testimony and is not direct evidence of anything.

Is that a satisfactory limitation on this exhibit?

Mr. Strachan: Yes, but I think the jury should be instructed particularly with reference to the im-

(Testimony of Robert Hodge.)

proper use of the word damage, in addition. [2268]

The Court: Yes, I am going to get to that. These exhibits are going to be corrected. I will show you what is going to be done. This word damage, where it says, "Winckler & Smith damage," the word "damage" is going to be struck out.

Actually, that whole sentence should be changed to show what the witness means by that statement. This witness can't tell you what damage anyone suffered or did not suffer. That is one of the issues in this case. That is a question for the jury. So that should be changed.

As a matter of fact, I think counsel should make several changes. Where does it appear again?

Mr. Strachan: Well, it appears in the last line.

The Court: The last line?

Mr. Strachan: In the handwritten portion.

The Court: In the last line, it should go out, and also this statement up from the bottom where it says, "Winckler & Smith estimated profit from processing 15,000 tons of Valencia product oranges," is not a correct statement of what the witness has been talking about. That should be corrected. I think I prefer to let counsel work this over.

Mr. Strachan: The heading also, as Mr. Fisher points out, "Loss of Profits and Damage," I think is utterly——

Mr. Dixon: That was corrected, wasn't it?

The Court: No. The heading was not corrected. Counsel can work it over at the recess between

(Testimony of Robert Hodge.)

themselves. Certainly [2269] some of those statements need correcting and we will advise you later as to what we do with this and as to the changes we make. When you get the exhibit along with the case, you will see the changes have been made in it.

Any further questions?

Mr. Dixon: I just have one other question of this witness, your Honor.

Q. (By Mr. Dixon): Mr. Hodge, referring to Plaintiff's Exhibit 69, is there anything that you wish to add to your testimony by way of explanation of any of the questions put to you by counsel concerning the manner and method in which you arrived at the figures set forth in said exhibit?

Mr. Strachan: I don't think that is proper redirect, to ask the witness that.

The Court: I don't think it is proper in view of the way we handled it. I let the witness make his explanations as we went along so that the jury would have the matters before them instead of waiting for redirect and then having to go back and talk about matters that had long transpired.

Haven't you explained everything as you went along?

The Witness: Yes, sir; I thought I had pointed out everything as we went long.

Mr. Dixon: That's all I wanted to know, your Honor. It has been a long cross-examination. That is the only reason for my question. [2270]

* * *

Mr. Dixon: Exhibit 78 reads: Ladies and gentlemen of the jury, this exhibit is dated August 2, 1951, and is directed or sent to Hodge and Company, re: Winckler & Smith Citrus Products Company loan No. 400220.

"Dear Sirs:

"Pursuant to request of the subject company we are pleased to supply you with the following information. [2271]

"The principal unpaid balance of the subject loan as of July 31, 1951, is $50,499.04 with interest paid to July 1, 1951." [2272]

* * *

RONALD WALKER

recalled as a witness herein, having been heretofore duly sworn, was examined and testified further as follows:

Cross-Examination

By Mr. Strachan:

Q. Mr. Walker, you are the same Mr. Walker who previously testified in this case?

A. I don't think I have changed my identity.

Q. You have continued down to the present time to serve as trustee in this Chapter 10 proceeding?

A. That is correct, Mr. Strachan. I am still acting in [2273] that capacity.

Q. In regard to the status of the Reconstruction Finance Corporation's real estate loan and chattel mortgage loan to Winckler & Smith, I will ask you

(Testimony of Ronald Walker.)

to look at this copy of the court record, which is a petition——

The Jurors: Can't hear you.

Q. (By Mr. Strachan): I ask you to look at the Court's copy of the Reconstruction Finance Corporation's petition to modify, a stay, as it is called, and ask you if you recognize that document.

A. Yes, I do.

Q. Calling your attention to paragraphs 7 and 8, I would like to ask you if the facts there stated in regard to the condition of that loan are not correct?

A. Is this the Court file here or the one before the Referee?

Yes, I have examined these before and they are correct.

Mr. Strachan: I should like to read paragraph 7 from the Reconstruction Finance Corporation petition.

> "The indebtedness oved to your petitioner by said debtor is evidenced by a certain promissory note dated December 5, 1946, executed by said debtor as maker to the order of your petitioner as payee in the original principal sum of $100,000 payable on or before February 5, 1952. As of July [2274] 5, 1951, six installments of principal, each in the amount of $2,000, were delinquent, and on July 26, 1951, your petitioner exercised its election under the terms of the promissory note to accelerate the indebtedness so that the unpaid principal bal-

(Testimony of Ronald Walker.)

ance of $50,499.04 plus accrued interest became immediately payable.

"On August 15, 1951, your petitioner filed for record the notice of default and its election to sell under the power of sale in said deed of trust, and the date of trustee's sale was subsequently set for December 15, 1951."

Q. Now, can you tell us briefly, Mr. Walker, about the subsequent proceedings on that notice of foreclosure sale which was set for December 15th?

A. I believe the facts which you want, Mr. Strachan, are that the sale was continued two or three times, was finally scheduled for March 21, 1952, but was restrained by the Court order on March 20, 1952.

Q. The foreclosure sale was never conducted during the period of your trusteeship, was it?

A. No, sir. It was never conducted at all. The restraining order was continued from time to time while the plant was still operating under my supervision.

Q. That was until approximately when? [2275]

A. That was until the close of the season in 1953. Subsequent to that time the property was sold, as I have previously testified, and it is my understanding that the RFC loan was thereafter paid off by the purchaser at the trustee's sale.

Q. The RFC loan was one of the liens or charges against the property at the time it was sold?

A. That was a secured lien.

(Testimony of Ronald Walker.)

Q. Yes.

A. As far as it came under my handling.

* * *

Mr. Dixon: It is stipulated by and between counsel that TreeSweet was furnished 3,246.76 tons of lemons by Exchange Lemon pursuant to the letter of contract dated July 10, 1951, Plaintiff's Exhibit 31, already in evidence. Is it so [2276] stipulated?

Mr. Fisher: Subject to check, that is so stipulated. I find I don't have the documents. [2277]

The Court: All right. It will be stipulated. If any error is found in the facts, you call it to our attention.

Mr. Dixon: Plaintiff now rests, your Honor.

Mr. Strachan: We prepared a motion directed at the sufficiency of the evidence. We would like to have that presented.

The Court: We will excuse you ladies and gentlemen of the jury.

I think I had better excuse you until about 2:30. Before you go, let me say one other thing. Plaintiff has rested its case, and we have some other matters to take up, which we will take up in your absence.

This little misunderstanding between Mr. Strachan and me is no concern of yours. Mr. Strachan probably thought that he had mentioned Exhibit 67. If he did, I didn't hear him. He thought he had, and I thought he was still talking about 69, so we had a misunderstanding.

Incidentally, it is a lot easier for somebody to sit up, like you as a juror, and I as a judge, with nothing bothering us except what we hear, then it is for the lawyer who is trying to present a case, who is not only thinking about the question he is asking, but what he is going to ask next, and where does he go from there. If you ever had any corresponding experiences you will know what I mean.

I shouldn't have been irritated, Mr. Strachan, and [2278] apologize.

Mr. Strachan: Neither should I.

The Court: It was a misunderstanding between you and me. [2279]

* * *

The Court: The record will show the jury absent.

Mr. Strachan: If it please the Court, we have here a motion which has been served on Mr. Dixon, and have filed with the clerk, Defendants' Motion for Directed Verdict at the close of the plaintiff's evidence. I should like to have Mr. Williams present the argument in support of the motion, if I may.

The Court: All right. Let me read it first, if you will. [2281]

* * *

Mr. Williams: I am about through with the conspiracy count, because there is no point in discussing the TreeSweet contract, further, or the Silzle contract further. My point is that each of those contracts are lawful standing alone.

The Court: I agree, they are lawful standing alone.

I will go further. I will agree that Sunkist and EOP [2305] could have monopolized 100 per cent of the orange industry in Southern California.

* * *

The Court: In substance, then, your position is that therefore the dealings between Orange and Lemon back and forth has some evidentiary value?

Mr. Dixon: Some. Not much, your Honor.

If that was all there was we wouldn't be here. [2353]

And if it was not for the fact, also, that Exchange Lemon saw fit to give TreeSweet this special kind of deal in 1951, which no one else got, they might not even be a coconspirator in this case. But it is obviously of some advantage to Exchange Orange and to Sunkist that they are able to have the facilities of Exchange Lemon, an entirely separate and distinct corporation—true, it is a co-op—but to have the facilities of that corporation available to it to process oranges at cost if they care to do so. Because the control of the processing facilities here is just as much an important element in the control of the citrus juice market as is the control of the product which makes the juice.

The Court: All right. [2354]

* * *

The Court: In addition to making comparison between the oranges and oranges and juice and juice, is it also your contention that the juice as made would be entitled to make a comparison be-

tween oranges and processing contracts by which there could be figured out the price of the oranges?

Mr. Dixon: Yes, I think they are, your Honor. I think, however, that there is a question of fact here. Obviously, there are many questions of fact upon which your Honor will have to charge the jury with reference to these contracts. We wouldn't be here today if these contracts were only processing contracts. [2364]

* * *

The Court: All right.

The motion of the defendants for a directed verdict is denied as to the first and second and third causes of action.

I assume that there will be further motions at the end of the defendant's case, and any ruling that I make now is without prejudice to what I might do at that time.

You don't finally know, I don't suppose, until a case is completed what causes of action the plaintiff will go to the jury on.

Presently the indication is that you want to go to them on all three?

Mr. Dixon: Yes.

The Court: If you change your mind, I think that the third cause could be eliminated, and I would see no prejudice there, for the evidence offered on the third cause would in any event be available generally for background and general use as to one and two.

I want to study these sections further. I am in-

clined to think that they are properly in the case, but Mr. Dixon talks about not wanting to present any novel question, which would mean that he would like, at least as far as his ability is concerned, if he gets a judgment against the defendants, to get one that will stick, and I assume that he will study [2380] further, as I will, the Clayton and Robinson-Patman sections. [2381]

* * *

Mr. Strachan: I will call Mr. John A. Lynch as a witness for the defendants.

JOHN A. LYNCH

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: John A. Lynch.

Direct Examination

By Mr. Strachan:

Q. What is your business or occupation, Mr. Lynch?

A. I am a certified public accountant and my business is public accounting, certified public accounting, under the name John A. Lynch and Company, 231 South La Salle, Chicago, Illinois.

Q. What was your education for your profession?

A. I began my college career at Mount St. Mary's College in Emmitsburg, Maryland; then at-

(Testimony of John A. Lynch.)

tended the University of Pittsburgh, graduated in 1938, receiving a Bachelor of [2386] Science Degree, major in accounting. I took post-graduate work at Northwestern University and at Loyola University in Chicago.

Q. In what fields were the post-graduate work done?

A. In cost and advanced cost and cost installation systems—cost system installations.

Q. Where are you licensed as a certified public accountant? A. State of Illinois.

Q. When were you so licensed? A. 1946.

Q. Do you belong to any professional associations or societies?

A. I do. I belong to the American Institute of Accountants and the Illinois Society of Certified Public Accountants.

Q. Will you review the history of your experience in the accounting field?

A. Upon graduation from the University of Pittsburgh I accepted a job with the Bureau of Internal Revenue in the Income Tax Unit, and after approximately a 10-week training course was assigned to Chicago, Illinois. The major portion of that time I was assigned to Swift & Company cost analysis under the Processing Tax, and to cost analysis at Hunter Packing Company in St. Louis. In 1940 I resigned from the [2387] Bureau of Internal Revenue to accept an appointment as a Special Agent in the Federal Bureau of Investigation. I remained with them until November 1, 1945. The

(Testimony of John A. Lynch.)

experience in the FBI consisted specifically of investigations in the accounting line in the Court of Claims, claims of contractors against the Government, bankruptcy investigations, ascertaining financial ability investigations, antitrust investigations. Mostly—— [2388]

Q. Did you have any experience in connection with renegotiation of Government contracts?

A. Yes.

Q. War contracts and the like?

A. Right. We were the agency to verify for the various departments, State and Army—not the State Department, but Army and Navy and the Air Force, the allocable costs of specific contracts for the purpose of renegotiation.

Following my FBI experience, I became a resident partner of Barnes & Company, Certified Public Accountants, in Chicago. I operated the Chicago office for one year, at which time I went into business for myself, and I at the present time operate as a proprietorship, with a staff of five seniors and one junior.

Q. What is the nature of the practice that you conduct as John A. Lynch & Company?

A. Our practice is the general practice of public accounting, tax accounting, and system installations. During the course of our general practice, we have had special projects or special assignments embracing the sale of companies, valuation for estate purposes, cost analysis on negotiated Army contracts. I think that about covers it.

(Testimony of John A. Lynch.)

Q. Have you also had some experience in your private practice in accounting and cost analyses for antitrust cases? A. Oh, yes, sir. [2330]

Q. Will you tell us when you were first employed to do accounting work, your firm, rather, was employed to do accounting work in connection with this case?

A. I was employed by Mr. Hurd of the firm of Pope and Ballard in approximately May, 1955.

Q. Will you tell us what was done by you and your firm under your direction and supervision pursuant to that employment?

A. The scope of our investigation embraced the examination of the books and records of the plaintiff for the period 1951 and 1952, together with photostatic copies of certain documents, such as the Commissioner of California file, which embraced the period prior to 1951, transcripts of testimony taken in various phases of the business life of the plaintiff. We were not limited in any respect in the investigation we made.

Because of the magnitude of the assignment, I generally handled all the preparation of the financial statements, the work dealing with the preparation of the financial statements, and Mr. Regan, who is an employee of mine, performed most of the work with respect to costs and cost analyses during the course of that investigation.

Q. To what extent did you familiarize yourself with the work that Mr. Regan was doing?

(Testimony of John A. Lynch.)

A. The entire assignment was under my jurisdiction and [2390] accountability. I reviewed all the work of Mr. Regan and his assigned staff members, and he in turn reviewed all mine, so that there would be a cross-review on the investigative techniques of both units.

Q. You said that with respect to the period subsequent to the year ending January, 1950, you had available the corporate financial records and underlying documents?

A. Well, we had the books and some of the underlying subsidiary records. We were limited to a certain extent by lack of pertinent supporting records. We had sufficient information, I believe, for all our purposes, however.

Mr. Strachan: I would like to refer to the partnership balance sheet that is marked as Exhibit A-1 for identification. I would like to have copies distributed to the jury. [2391]

Mr. Dixon: May the record show at this time, your Honor, that the palintiff registers a general objection to any evidence which antedates the institution of active operations by this plaintiff after the termination of the proceedings under Chapter XI by this court in the early part of 1949, as being wholly irrelevant, immaterial, and not tending to prove or disprove any of the issues of this lawsuit.

The Court: How much time do you propose to spend on matters prior to—what was it, about January of '49 or early in '49 when the company came out of reorganization?

(Testimony of John A. Lynch.)

Mr. Strachan: I simply intend to go over the three certified balance sheets, tracing out the earnings record of the company, and tracing out the history of the fixed assets. I shouldn't think it would take over, I would say, maybe 45 minutes.

I don't think the time really bears on the objection that Mr. Dixon has made.

Mr. Dixon: We have made it abundantly clear, counsel, that we rely on the years 1949, '50 and '51 in connection with this case, and the proceedings that occurred after this company resumed operations.

The Court: I know both your positions.

I am going to overrule the objection; but, on the other hand, I am not going to permit you unlimited time on these preliminary matters, because the issue in this case, as I [2013] told the jury before, is the condition of the plaintiff company in 1951. Also the question of its earning record as asserted by the plaintiff in the years '49 and '50, as well as '51.

I will certainly permit the defendant to introduce evidence or go into matters which bear upon those issues, as far as the condition of the plaintiff is concerned, which bear upon what the condition of the plaintiff was in the year 1951; and, therefore, the evidence, I hold, will be admissible, but I think it is a matter of controlling the time, as to how much time we put on these preliminary matters.

In other words, the plaintiff does not claim that it was damaged in the years '49 or '50. It claims it was damaged in the year '51. And the defendant

(Testimony of John A. Lynch.)

is entitled to show what the character of this plaintiff was in the year '51, and to do that the defendant is entitled to go back—let's just take one example. The land which existed in 1951 was land which was acquired in, I think, during the partnership days—wasn't it?

Mr. Strachan: That is right.

The Court: Therefore, there is a certain continuity in tracing this matter out. However, the pertinent issue is, as far as the condition of the plaintiff, what was it in '51. So this type of evidence is material and only material insofar as it explains what the condition of the plaintiff was in '51. [2393]

Mr. Strachan: Yes. And on that, your Honor, it is our feeling that you can't really understand what happened after the conclusion of the 1949 reorganization without knowing what went ahead, not only with respect to land, but with respect to other things.

For example, there was a discharge of indebtedness that occurred there. That in the subsequent period became an apparent surplus or capital asset. And those things I want to trace out.

The Court: All right. However, I am going to limit you on that. We have been all over that before.

You are talking about this $39,000 item?

Mr. Strachan: I wasn't at that point.

The Court: We did discuss that.

Mr. Strachan: I was talking about an item of over $200,000.

The Court: In the case of the $39,000 item, the evidence shows it was discharged. I will permit you

(Testimony of John A. Lynch.)

to show what it was that was discharged, but we are not going to go into all the background on it, because the ultimate thing you want to prove is——

Mr. Strachan: That it was discharged.

The Court: And, therefore, under your contention the assets of the company were increased that much.

The same rule would apply to the other matters, a matter [2394] of judgment as to the extent of this.

I make these remarks only for the reason that I am trying to keep the jury's mind on the issues in the case.

If we were going to try every issue that came up, every little fringe issue, we would be here forever. So let's proceed with that understanding.

The objection is overruled.

Mr. Strachan: As to that $39,000 item, as long as it has been injected, I believe Mr. Irwin has a statement as to the composition of that, and we can stipulate to it. I talked to him by phone a day or two ago and he said he had such a statement.

Perhaps we can use it when we reach that [2395] point.

* * *

Q. (By Mr. Strachan): Mr. Lynch, Exhibit A-1, which I now show you, is the balance sheet of the partnership as of the time of the transfer of assets to the corporation, is that correct?

A. That is correct.

Q. Will you call attention to the items on that

(Testimony of John A. Lynch.)

balance sheet that you regard as having accounting significance?

A. The date of the balance sheet is immediately prior to the transfer of assets to the corporation in exchange for the stock. On this balance sheet the total current assets as reflected thereon and the total current liabilities reflected thereon indicate a bad current ratio prior to the corporate operations. The ratio is less than one to one, which indicates that ratio is less than one to one, which indicates that even the conversion of the accounts receivable and inventories to cash would be insufficient to pay the current obligations.

Proceeding further, the fixed assets are reflected at [2397] the appraised value, notably an increase of $150,000. That has significance in effect because the partners' capital accounts are reflected correspondingly at $240,000.

The reflection of that appraisal is indicated at the bottom in the capital section where the $150,000 is spread among the partners. There appears to be no relationship existing between the capital contributions which represented the original investment of the partners and the markup of the assets. Without being specific, the percentage ranged to ten times of original capital contribution on the one hand to a six per cent allocation on the other hand.

Mr. Strachan: I would like to have the document that has been marked Exhibit BA [2398] distributed.

* * *

(Testimony of John A. Lynch.)

(The exhibit referred to was marked Defendants' Exhibit BA for identification.)

The Court: What is the materiality of this, counsel?

Mr. Strachan: Sir?

The Court: What is the materiality of BA?

Mr. Strachan: This is a summary statement of the allocation of capital which the witness has just testified to.

The Court: What would it tend to prove?

Mr. Strachan: It tends to prove that the write-up was applied differently to different classes of assets, would tend to indicate the unsupportable, or, you might say arbitrary basis of the write-up and its distribution.

The Court: You concede partners would have a right at the time they form a corporation to distribute their shares among themselves as they see fit?

Mr. Strachan: I think that they could do that; yes.

The Court: Is there any objection to the exhibit before we go any further with it?

Mr. Dixon: Yes, your Honor. I wish the record to again show that I have a continuing objection to anything that does not directly relate, and I mean directly relate to the [2399] situation that plaintiff relies on in this case as set forth in its exhibit of operating income and balance statements commenc-

(Testimony of John A. Lynch.)

ing wth the year 1949, the first one being—I think it is Exhibit——

The Court: We have three different views here. You have one, Mr. Strachan has one, and I have another. You would rule it all out. Mr. Strachan would put it all in. I think some goes in and some goes out. You object to any further proceedings as to BA?

Mr. Dixon: I do; yes, definitely, your Honor.

The Court: Sustained.

Mr. Dixon: In other words, so that I may make my position clear, your Honor, I have no objection to any evidence that is offered that may directly relate to any item contained on any exhibit that the plaintiff has offered to show its operations after the termination of proceedings under Chapter XI, provided it is directly related to it.

The Court: It is really none of the jury's business why I sustain an objection, but so there won't be any mystery about it, this Exhibit BA which you now hand in concerns solely the question of how the write-up was allocated among the partners at the time the corporation was formed. It hasn't anything to do, therefore, with the issues of this case.

You have already inspected the exhibit, so forget about [2400] it. However, there is other evidence in the record to the same effect.

Mr. Strachan: Of course, I hadn't laid the basis for the offer.

The Court: I asked you what you would propose

(Testimony of John A. Lynch.)

to show by it, and I based my ruling on what you stated.

Mr. Strachan: I would have asked the witness to state whether he prepared the exhibit, what data he used, how he used it, and on the basis of his testimony, I would offer it in evidence. The lack of basis, I suppose, is not the ground for the ruling?

The Court: The lack of basis is not the ground. It is based on your purported offer to prove by it.

Q. (By Mr. Strachan): Mr. Lynch, in regard to the depreciation shown by the difference between the columns of cost and appraised value, Mr. Winckler testified——

Mr. Winckler: Speaking now about A-1, counsel?

Mr. Strachan: Yes.

Mr. Dixon: I assume I have a continuing objection, your Honor.

The Court: You have one. Overruled. [2401]

Q. (By Mr. Strachan): Mr. Winckler testified that the machinery and equipment shown at a cost of about $89,000, having an apparised value of $154,000, the difference could be accounted for because there were costs involved in installing machinery and equipment over and above the invoice price of the machinery and equipment. Is it correct accounting or bookkeeping practice to enter on the books the invoice only of the machinery and equipment, without also including in that account the other costs, such as freight and installation?

A. Sound accounting principles state that all costs incurred in the nature of freight, installation,

(Testimony of John A. Lynch.)

and wiring and so forth, should be reflected in the account up to the point of operation. We didn't have the records to verify that here. But if sound accounting practices were followed, then the freight and installation charges would be reflected therein.

Q. I now ask you to refer to Exhibit A-3.

I ask that copies be distributed among the jurors.

The Court: Is A-3 in evidence?

Mr. Strachan: I will offer it in evidence now.

Mr. Dixon: Just the general objection, your Honor, on the basis heretofore stated.

The Court: Overruled. A-3, if it hasn't been heretofore received in evidence, is received now. Copies may be [2402] passed to the jury.

* * *

The Court: This is the balance statement as of January 31, 1947?

Mr. Strachan: That is correct, your Honor. That is the end of the first fiscal year of operations under corporate organization.

Q. (By Mr. Strachan): Will you refer to Exhibit A-3 and point out the items therein which have accounting significance in your opinion?

A. Again, in the year following Exhibit A-1 the current position of the company indicates that the conversion of all current assets into cash would be insufficient to pay the current liabilities. The ratio is not a normal ratio upon which funds would be advanced for credit purposes. The fixed assets as

(Testimony of John A. Lynch.)

reflected herein are shown at a figure which is hybrid in nature——

Q. What do you mean the figure is a hybrid figure?

A. It has the assets reflected after a write-up of $150,000, and the subsequent additions are reflected at cost. So that the final figure is a combination of cost and appraised value on certain specific assets.

Q. With no distinction made in the accounts between [2403] costs and appraisal?

A. That is right. It is not noted, and there is no indication that such assets are not being reflected at cost.

An examination of the notes pertinent to the balance sheet indicates that the assets are carried at the book value from the predecessor partnership, but the book value is not spelled out to include the appraised value.

Referring to "Other Assets," there is an item of $10,000 prepaid employees' bonus——

Q. That is under the classification, "Other Assets," at the foot of the assets column?

A. That is correct.

Mr. Dixon: May I interrupt for a moment, your Honor?

I notice that this Exhibit A-3 said: Subject to notes contained in report. Does the witness have and did he have access to those notes, and do you have them with you now, Mr. Witness?

The Witness: I have them here.

(Testimony of John A. Lynch.)

Mr. Dixon: Are any of these matters that you are talking about now covered in those notes?

The Witness: I referred——

Mr. Dixon: I am talking about the notes that are mentioned here that are not attached to this Exhibit A-3.

The Witness: I explained that the notes referred to the partnership predecessor book cost. That is the only note [2404] that refers here——

Mr. Dixon: I ask if they have these notes that they be attached to this exhibit so that the jury will have the full benefit of the notes which accompanied this report.

Mr. Strachan: There is no objection to them being before the jury, but if counsel for the plaintiff thinks there is anything in there that qualifies this, I suggest he pick it up and read it in, rather than have us encumber the record and prove a negative.

Q. (By Mr. Strachan): As I understand it, Mr. Lynch, there is no indication in these accompanying notes, or notes in the accompanying report, that distinguishes between the value of fixed assets due to appraisal write-up and that due to cost; is that correct?

The Court: I am permitting you to go back on some of these matters, again there is a three-way disagreement between the two lawyers and the judge, and I think the notes should be attached. They can be attached later on, since they are apparently a part of the statement, and the statement itself with-

(Testimony of John A. Lynch.)

out the notes would not be a complete statement.

You may do that later on.

The objection is overruled in part and sustained in part.

Q. (By Mr. Strachan): You were referring to the so-called [2405] assets of prepaid employees' bonus; will you complete your explanation of that item?

A. That infers that a bonus arrangement was in effect, and that the amount taken was—I don't wish to infer the amount taken, but the amount paid was paid to an employee. In reality, that should be an account receivable officer. If there was a bonus, it would have been computed on a negative figure, unless it was related to sales or gross profit, or some type of percentage arrangement prior to a net profit figure, as the operation for the year showed a loss.

To continue with the significance of this balance sheet. The capital stock reflects as paid-in capital for the stock $240,697.22, which includes the $150,000 write-up that is offset in the fixed assets section without note thereto.

Q. What effect does that have on the statement of net worth of $229,000, approximately?

A. Without disclosure, it connotes the fact that they have an actual cost net worth of $228,000, when in reality it is approximately $78,000.

The Court: Mr. Witness, Exhibit A-1, the year before, showed the cost value and the appraised value for the assets?

The Witness: That is correct.

(Testimony of John A. Lynch.)

The Court: Now, do I infer from your statement that every year thereafter there would have to be carried forward on the statement the matters which appeared on the previous [2406] statement?

The Witness: That is correct, your Honor, in accordance with sound accounting practice and with the rules of the American Institute of Accountants, and various state societies, you have to disclose to potential creditors the pertinent facts with respect to financial statements which are issued.

The Court: Do you mean, therefore, that you would have to show on your balance sheet the date of appraisal, for instance, of a building?

The Witness: That is right, your Honor.

The Court: The date of appraisal?

The Witness: Or place it in the surplus section of your balance sheet by date, in order to show that some reorganization or recapitalization took place on that date.

The Court: Go ahead.

Q. (By Mr. Strachan): The second sheet of Exhibit A-3 is the income account for the same year, namely, the corporate fiscal year ending January 31, 1947. Are there any items there that call for attention from the accounting point of view?

A. The important thing is to note the operations resulted in a loss for the year, and that that loss included a loss of capital assets dismantled.

Q. In other words, the inclusion on the income account of a loss on capital assets, as it is reflected here, [2407] is in accordance with correct bookkeep-

(Testimony of John A. Lynch.)

ing and accounting practice? A. It is.

Q. I would like to have you refer to Exhibit A-4. And I would like to have copies of that distributed.

The Court: Mr. Clerk, is A-4 in evidence?

The Clerk: A-4 was admitted; yes, your Honor. Counsel has now supplied extra copies.

The Court: Pass it to the jury, and pass the extra copies.

Mr. Strachan: And A-5 I should also like to have distributed in this connection.

The Clerk: A-5 is not in evidence at this time.

Mr. Strachan: I will offer it, then. It is the income account for the same period, ending January 31, 1948.

The Court: A-5 received in evidence.

(The exhibit referred to was received in evidence and marked as Defendants' Exhibit A-5.) [2406]

Q. (By Mr. Strachan): Referring to Exhibit A-4, being the balance sheet for the second year of operation under corporate form, I ask you to call attention to and express your opinion on matters appearing in that exhibit which are of accounting significance?

A. A-4, representing the position of the company one year subsequent to A-3, discloses further aggravation of the current position. In this instance the ratio of current assets to liabilities is approximately one to three as compared to a normal current ratio of two to one. This reflects a bank overdraft. It shows

(Testimony of John A. Lynch.)

petty cash of $59.85. Insufficient cash to meet the accrued taxes, which are immediately due if they represent payroll taxes

The conversion of all current assets into cash would not be sufficient to have paid the current liabilities.

Again, the fixed assets are reported at a figure which includes the appreciation or the write-up of $150,000 without disclosure specifically that the write-up is included therein.

The surplus section of the balance sheet reflects a captal stock which includes the $150,000 write-up with no disclosure that it was based on an appraisal or based on a fact other than any officers' or partners' evaluation.

Mr. Dixon: If the court please, I wish to again object to some of this testimony unless it is stipulated and made [2089] clear that none of these records, balance sheets of this company, were ever made available to the public or used for public purposes in selling stock or anything else until the application was filed and permission granted in 1951.

The Court: I don't see the materiality of some of this. If this was a suit involving what some member of the public had relied on, a balance sheet, then this testimony about the fact that it was not indicated when the property was appraised to arrive at a certain value, would be material.

What has that got to do with the issues of the case? You say it is poor accounting practice. What

(Testimony of John A. Lynch.)

does poor accounting practice in 1947 and 1948 have to do with the issues of the case?

Mr. Strachan: This goes to more than poor accounting practice.

The Court: What does it tend to prove? That is the test of admissibility of evidence. What does it tend to prove?

Mr. Strachan: Well, one of the things it tends to prove is that the apparent valuations on the assets at the time of the final failure of this company were not true values.

The Court: As far as that is concerned——

Mr. Strachan: And another thing——

The Court: Now, let's take one thing at a time. As far as that is concerned, it isn't material in my opinion. What else would it tend to prove? We are not trying why this [2419] company went into reorganization upon the first occasion. We assume it did, and we assume it did probably for good reasons.

Mr. Strachan: It also goes to prove that the company, and when we finish with this showing we will have demonstrated that the company was a consistently losing operation.

Mr. [illegible]: I object to that comment, your Honor. That is the conclusion of counsel here, and that is why I am objecting to this witness——

The Court: Just a minute. The objection is overruled. I have permitted you to show the statement which shows whether the company lost or made money, but I am speaking now specifically of the

(Testimony of John A. Lynch.)

questions you have been asking this witness as to what was good or bad accounting practice. What does that tend to prove?

Mr. Strachan: Well, I shouldn't perhaps limit it to whether it is good or bad accounting practice. Perhaps it should be whether the records accurately reflected the true conditions. That is what I mean by sound accounting practice. I think sound accounting practice does reveal the condition that actually occurred, and insofar as the practice followed here departed from that, that is what I want to point out. I am not arguing theoretical accounting processes.

Mr. Dixon: Your Honor, the reason I rose to object to this question was the fact that this witness on a general [2411] question testified about some mark-up on which there was no basis for it. The record shows, and counsel knows that it was based upon the appraisal that is already now in evidence.

The Court: I understand. Your general objection is overruled. You will have to object specifically to particular things that come along, because you made a general objection, and some of this is admissible and some isn't.

Ladies and gentlemen of the jury, you are not concerned with whether or not somebody reading this document would or would not have been misled. That is not in issue in this case. Do we understand each other?

The Jurors: Yes.

The Court: Whether the plaintiff was damaged

(Testimony of John A. Lynch.)

by alleged acts of the defendant has nothing to do with whether an investor might have been misled in going to this company.

Mr. Strachan: I don't agree with that view in the light of the prospectus position here, and this evidence we will bring to bear on the prospectus which we will show was a misrepresentation.

The Court: You will make that offer out of the presence of the jury, then, because we are not trying any case that is concerned with whether any investor was misled. You could multiply the issues in a lawsuit, and particularly one of this size and magnitude, ad infinitum. But we are not [2412] going to do it. There is no indication whether anybody was misled.

I am going to permit you to show what this corporation was like in 1951 and things that existed in 1951 that go back to something prior to that time. We are not going to try some supposed issue as to whether some investor was misled in putting money into this company.

Mr. Strachan: I am not trying that issue, but Mr. Winckler in his testimony undertook to give the impression that the company was at the dawn of a new era, it had the permission of the state to sell a lot of securities, it had a fine prospectus that showed a long earning practice, and that the corporation failed because of lack of fruit supplied it. I want to show that is not the situation.

The Court: Well, you show it by proper evidence. We will rule on the matters as they come along.

Again, ladies and gentlemen, argument of counsel

(Testimony of John A. Lynch.)

and discussions by the court are not evidence and are not to be considered by you in the trial of this action.

Proceed.

Q. (By Mr. Strachan): Mr. Lynch, I now call your attention to the item under the capital stock and surplus section here on Exhibit A-4, which shows loss for the year ended January 31, 1948, as $72,221, and ask you whether that correctly represents, according to standard and approved accounting [2413] practices, the loss sustained in that year?

Mr. Dixon: I object to that question as being entirely too general, your Honor, having no tendency to prove or disprove any issues in this case.

The Court: Counsel, are you approaching the question as to whether the $47,000 should be included in that figure?

Mr. Strachan: Correct, your Honor.

The Court: Objection sustained. Reframe the question. Call attention to the other item and then ask the question.

Q. (By Mr. Strachan): I will ask you, referring to Exhibit A-4, whether there appears anywhere on that balance sheet any item or items which should be reflected so as to appear as a part of the loss for the year which have not been so included?

A. There are.

Mr. Dixon: I object to the form of the question, your Honor.

The Court: Overruled.

Q. (By Mr. Strachan): Will you name one?

(Testimony of John A. Lynch.)

A. The reduction in market value of inventory, $47,849.12.

Q. Will you state why it is that that reduction in market value of inventory should be included as an item entering into the profit or loss for the year?

The Court: This is according to your opinion as to [2414] standard bookkeeping practice?

The Witness: That's right, sir.

The Court: All right. Go ahead.

The Witness: Recognized accounting practice dictates inventory adjustments should be reflected as a proper charge against profit and loss accounts. The accounting principles anticipate losses, but do not anticipate profits. Such losses should be recognized. If the inventory value is not there, it should be immediately put on a sound pricing basis and the difference written to profit and loss account.

Q. (By Mr. Strachan): And as I understand it, in this processing industry, for example, when citrus products are packed, and instead of being sold immediately are held in inventory, they are included as assets in the current assets group; is that correct?

A. That is correct.

Q. And that is what is shown on Exhibit A-4 in the item, inventories, finished products; is that correct? A. That is correct.

Q. So if the products or inventory is credited as a current asset at the time the goods are produced, then if that inventory credit is too great and you have to reduce it, it should be reduced from the inventory as a current loss; is that correct?

(Testimony of John A. Lynch.)

Mr. Dixon: If the court please, may I again register an [2415] objection to this line of questioning. I fail to see where it has any relevancy whatever to the issues of this lawsuit.

The Court: Overruled. The only relevancy would be the question, did the company make or lose so much money in a certain year. That is the only relevancy I see. It is permissible for that purpose.

Mr. Dixon: I just want the record to show that we are not relying on or contending anything with reference to what happened prior to the reorganization under Chapter XI.

The Court: All right. But that doesn't mean the defendant can't rely upon the fact that you lost money in 1948 and went into reorganization.

Mr. Dixon: It is conceded that we did.

The Court: All right. Overruled. Is there a question pending?

The Witness: Yes. It should be deducted from the income account.

The Court: The way it is handled on A-4, you get the same total, do you not, on A-4?

The Witness: You do, but it is misleading.

The Court: You would have included it up as part of loss for the year, added to the $72,000?

The Witness: That is correct.

The Court: And, secondly, on A-5, the income account, you would have included it to show a greater loss in the year [2416] ending January 31, 1948, than it showed?

(Testimony of John A. Lynch.)

The Witness: That is correct, your Honor.

The Court: That is your point, right?

The Witness: That's right, your Honor.

The Court: Is that all you want to cover?

Mr. Strachan: Yes.

The Court: Okay.

Q. (By Mr. Strachan): Are there any other items on the balance sheet that, according to standard accounting and bookkeeping practice, would be included in profit and loss, but have not been so included?

A. Yes; there are. The decrease in the reserve for doubtful accounts would represent an additional income item of $1,500, which should be treated in the income account, and this reserve for damaged merchandise, $5,000, I would think it should be included, but I wouldn't want to specifically state that because if the merchandise has not been damaged as yet and it is just a reserve for estimated damage, then it is not a proper P and L charge, but this item, reserve for damaged merchandise, is indicative of the fact that merchandise had been damaged, and therefore I would have included it as additional loss for the current year.

The Court: And those two items, 5,000 and 1,500 are items that you would have in all events included in profit and loss? [2417]

The Witness: I would have included them personally, but I wouldn't say in all events, because of the qualification I made with respect to the damaged

(Testimony of John A. Lynch.)

merchandise, that it might be just a provision for estimated future damage which wouldn't be current.

Q. (By Mr. Strachan): Tell us what would have been the statement of loss for the year ended January 31, 1948, had the inventory adjustment of reduction in market value of inventory been included in profit and loss?

A. It would have been approximately $125,000.

Q. Instead of 72,000?

A. That is correct. [2418]

Q. Now, referring to A-5, would you have the same comment to make on the loss for the period that is stated at the foot of that exhibit?

A. I would.

Q. In your examination of the fiscal records of this company, do you know whether the loss on inventory was, for income tax purposes, included or excluded from the income reported for that year?

Mr. Dixon: I object to any inquiry along that line.

The Court: Sustained.

We have gone over that before, counsel. What was done for income tax purposes has nothing to do with what is done for the accounting purposes of the company. There are different rules, statutes, different provisions involved.

I will put it very broadly. I don't care whether this company, as far as the issues of this case are concerned, defrauded the government or defrauded themselves on those returns. It hasn't got anything to do with the issues of this case. [2419]

* * *

(Testimony of John A. Lynch.)

The Court: The record will show the jury present.

Q. (By Mr. Strachan): Mr. Lynch, I forgot to ask you some preliminary questions, whether the working papers which you and Mr. Regan prepared from the books and records and other documents of the Winckler & Smith Corporation are in the courtroom and are available for inspection of opposing counsel and their accounting advisers.

A. They are.

Q. You were not furnished with any balance sheet or income account for the fiscal year ended January 31, 1949; is that correct?

A. That is correct, we had no financial statements.

Q. At the end of the year January 31, 1949, the corporation's affairs were still in bankruptcy reorganization under Chapter XI?

A. That is correct. [2420]

Q. Did you find in any of the books and records that were made available to you any record of the profit or loss realized by the corporation during that fiscal year ending January 31, 1949?

A. Yes, sir.

Q. What record did you find?

A. A 1950 federal income tax return reflected the amount of the loss for the operating year 1949.

Mr. Dixon: If the court please, I again object to that and move that the answer be stricken, for the reasons previously given.

(Testimony of John A. Lynch.)

The Court: Did you inspect the trustee's or the receiver's reports?

The Witness: No, your Honor. I inspected the income tax return.

The Court: The objection is sustained. The company was in reorganization during that period. What the income tax returns would show would have no bearing, in my opinion, on the issues of the case.

Mr. Strachan: Without, your Honor, undertaking to argue the matter after the ruling, it seems to me that a statement that is made by corporate officers as to a gain or loss during the particular year, quite without regard to its carry-forward or carry-back implications, is evidence of what the corporate gain or loss was. [2421]

The Court: What would it tend to prove—that the company was losing money during that year?

Mr. Strachan: Yes, sir.

The Court: It wasn't operated by the officials of the company; it was operated by the court through the court officers. It would tend to show that a court officer had not been efficient in operation?

Mr. Strachan: No; it doesn't show that at all. The court officer's conduct we are not impeaching in the least. The court officer, receiver or trustee, keeps a set of books for his own purposes, his receipts and disbursements, and accounts to the court on that basis. But the corporation that ought the refuge of the bankruptcy proceeding must still keep its records of gain or loss. Those can be tied into the

(Testimony of John A. Lynch.)

receiver's, but there still is a corporate profit or loss, distinct from that of the receiver, and that is what I am trying to show.

The Court: Objection sustained. [2422]

* * *

The Court: Then what you are interested in is the balance sheet and the assets and liabilities?

Mr. Strachan: And the income account.

The Court: That is 61, and the clerk has extra copies of it.

Mr. Strachan: That is all right.

The Court: Pass 61 to the jury.

Mr. Dixon: My attention has just been directed, your [2423] Honor, to the fact that the covering letter is not in as part of the exhibit of the plaintiff.

The Court: That is what I called Mr. Strachan's attention. The covering letter is in Exhibit G for identification.

What do you want?

Mr. Dixon: I would suggest that the covering letter, at least, be offered in evidence, so if any reference is going to be made and criticism made of it, that it be part of the record of this exhibit.

The Court: Give G, then, the exhibit Number 61-A. Is there any objection?

Mr. Strachan: No.

The Court: Received in evidence as Plaintiff's Exhibit 61-A, which is really 61 plus the covering letter. [2424]

* * *

(Testimony of John A. Lynch.)

Q. (By Mr. Strachan): Referring to the income account, which is part of Exhibit 61, I will ask you to point out any matters that from your examination of the books and records of account are not correctly reflected in the income account.

A. Our examination reflected that the operations for the year ended January 31, 1950, embraced a period when a loss on the sale of assets was realized, but such loss was not recognized in this income account. Our examination reflected that——

Q. Will you tell us specifically what records you referred to to determine when the loss on the sale of fixed assets did appear on the books and records?

A. The actual books and records themselves reflected entries as of July 31, 1949, recording the loss. Reference back to the entries, the general entries covering that entry, reflected that the loss took place April 3, 1949.

Q. April 3, 1949?

A. The loss actually occurred April 3, 1949. The cash proceeds from the escrows were received into the corporation at that time, and the reports of the accountants for the firm indicated the sale at March 1, 1949. But the actual records [2425] reflect April 3rd. The income tax return states the sale took place April 3, 1949.

Q. When you say the accountant's report, you are referring to the second page of Exhibit—what was it, 61-A?

A. No. I was referring to the notes that ac-

(Testimony of John A. Lynch.)

companied that report at the time. I believe it is our A-6, if I am not mistaken, page 2.

That is correct.

The Court: Let me look at Exhibit 61-A, Mr. Strachan.

(Document handed to the court.) [3436]

Q. (By Mr. Strachan): As I understand it, the Hodge & Company report rendered in August of 1949 fixed the date of the sale of assets as of March, 1949; is that correct?

A. March 1, 1949.

Q. And what was the amount of the loss which the Hodge report stated as of March 1, 1949?

A. $169,377.32.

Q. Is that a loss which an accountant would reflect as a part of profit or loss for the year under review if he found on the books and records of account that it was recorded as a transaction occurring in that year?

A. It would be. It would be reflected in the income statement as a loss from the gain or sale of fixed assets, the same as the prior exhibit, A-5 reflected a loss in the sale of an automobile, and the same as Exhibit 3 reflected the loss on the capital assets dismantled.

Q. Then in eliminating from the profit and loss for the year this loss of 169,000 on the sale of the plant, the accountant departed from the practice that he had theretofore consistently followed?

A. That is correct.

(Testimony of John A. Lynch.)

Q. As including such items in the profit or loss?

A. That is correct.

Q. Are there any other items reflected in this balance sheet which are not in accordance with the books and records? [2427]

A. Our examination reflected further a write-off of an accounts receivable of $38,140.33, which amount would ordinarily be classified in an income statement either as additional compensation to an officer or as a bad debt. That item is not reflected in the income account.

Q. How was it reflected in the books?

A. It was charged to surplus without passing through the income account.

The Court: Did you ascertain from the inspection of the proceedings in reorganization that the write-off of that item had been arranged for as part of the arrangements made to get out of reorangization?

The Witness: My examination reflected the opposite, your Honor. It was additional compensation, and my recollection of the transcript at the bankruptcy hearings was that——

The Court: That is not my question. You are not answering my question.

The Witness: I am sorry.

The Court: Did you inspect the minutes of the corporation while the corporation was in reorganization?

The Witness: I did, sir.

(Testimony of John A. Lynch.)

The Court: You sat through this trial, did you not?

The Witness: Yes, sir.

The Court: You heard the testimony?

The Witness: I did. The minutes reflect the write-off [2428] in June, 1949.

The Court: I am talking about, did you hear the testimony about the minutes in, I think January?

The Witness: I did.

The Court: Whereby certain escrows were arranged for and this item was to be taken into account, or part of it?

The Witness: I heard it, your Honor, but it was not.

The Court: You didn't take that into account?

The Witness: The minutes reflect that the stock was purchased on March 5, and that is part of the 38,000, and Bernard J. Smith, the corporation loaned Mr. Winckler $4,000 to make the first payment. So this is March 5. It couldn't have been prior to January 31, the date of the reorganization.

The Court: You mean the effect of it?

The Witness: The cash check was dated the same date, your Honor, or subsequent thereto.

The Court: The time it became effective was after the date of the reorganization, is that what you mean?

The Witness: No, sir, your Honor. I mean that after the reorganization by two months this transaction took place, according to the minutes and ac-

(Testimony of John A. Lynch.)

cording to the cash checks which were issued and charged in this 38,000.

The Court: All right. Go ahead.

Q. (By Mr. Strachan): Had the income account for the year ended January 31, 1950, been prepared from the transactions [2429] which were shown in the books and records of account as having occured subsequent to the reorganization proceedings and within the year ended January 31, 1950, what would be the effect on the statement of profit or loss for that year?

A. The effect would have been to have shown a loss.

Q. How would you arrive at the amount of that loss from the books and records of the corporation?

A. The loss would have been arrived at by deducting from the profit listed at 120,000, deducting 169,000 on allowance on the sale of assets and deducting the 38,000 as either additional compensation or as a bad debt. That would aggregate roughly $85,000 loss for that year.

Q. Instead of a profit?

A. That is correct.

Q. I will ask you to refer to the balance sheet as of the close of that year. Tell us by referring to that balance sheet what, if any, transactions you found appearing on the books and records of the corporate organization that are different from the transactions and conditions reflected on that balance sheet?

(Testimony of John A. Lynch.)

A. Our examination of the minutes and the books reflected that the transactions I previously spoke of with respect to the loss and the sale of the assets and the forgiveness of the debt were backed up to be included in the results of the prior year's operation, in the 224,000. This Exhibit G [2430] fails to reflect the loss or any of the dealings surrounding the transactions in this statement. The disclosure should have been set forth in order to enable the reader to determine, regardless of classification of the expenses or the loss, to determine that the incidents occurred during the current year and that they were not prior to January 31, 1949, as shown on this deficit of $224,000.

Q. Without some explanation of those transactions or any reference to them, would the balance sheet correctly reflect the profit or loss for the period to a person to whom it was submitted?

A. No——

Mr. Dixon: I object to the form of the question. It should be made clear to the jury this is the witness' opinion.

The Court: Sustained. It is not a question of who this was submitted to. The defendants never relied on the statement. That is not a question here. You can ask the witness if in his opinion that was proper bookkeeping practice, but let's not inject into the case questions about who these were submitted to.

Mr. Strachan: The record shows that they were submitted to various persons.

(Testimony of John A. Lynch.)

The Court: There is no issue in the case as to the fact that the defendants—do you contend that the defendants relied at any time on these balance sheets or assets and liabilities [2431] sheet?

Mr. Strachan: No, but——

The Court: Then that's the end of that. You may inquire whether it was good bookkeeping practice, what it would have shown if it was done the way he said it should be done, but keep out of this case the talk about if it had been submitted to somebody.

Mr. Strachan: It is apparent it was submitted. There is evidence on that.

The Court: What has that got to do with the case?

Mr. Strachan: It has this to do with it, that a person not realizing these transactions that were disguised behind this balance sheet, would have extended credit, and eventually the over extension of credit by the customers, by the can suppliers and various people, would have had a very material bearing on why the corporation went through its failures.

The Court: Objection sustained. You may inquire as to what was good bookkeeping practice and what he would have done, this witness would have done.

Mr. Strachan: All right.

Q. Referring, Mr. Lynch, to the item at the bottom of the liability sheet, capital stock and deficit, will you tell us what if any items shown in that

(Testimony of John A. Lynch.)

capital stock and deficit are not correctly reflected as sound accounting practice, and if any of those transactions appear not to be supported [2432] by the underlying books and records of account?

First, I will refer you to the 240,000 some odd dollars of capital stock.

A. Referring to the $240,697 of capital stock indicates a continuity of the same corporation which was the successor to the partnership, at which time the corporate stock had been issued for net assets with a write-up of $150,000 in it.

The next figure of January 31, 1949, showing deficit represents the accumulation of the $11,000 loss in 1947, the $135,000 loss in 1948, and the loss for the year 1949, plus the loss on the sale of the fixed assets, plus the write-off of the forgiveness of indebtedness, all of which was reduced by a credit which arose in the amount of $205,000 from forgiveness of debts on behalf of the debtor as a result of the first reorganization. That is the make-up, approximate make-up, of the item, 224, but as of January 31, 1949, the $205,000 forgiveness and the write-off of the 38,000 and the loss of 169, occurred subsequent to January 31 and hence should have been reflected in detail as operating results for the current year, or as capital adjustments for the current year.

Q. According to the books and records of the corporation, those transactions occurred during the fiscal year ended January 31, 1950, rather than during the prior year? [2433]

(Testimony of John A. Lynch.)

A. April 3, 1949, they occurred.

Q. It is your opinion it was not proper to record them as if they had occurred prior?

Mr. Dixon: If the court please, I think that is the conclusion of this witness and I move the answer be stricken. It is a question for this jury, if this is material, to determine whether this was or was not done during the trusteeship, and not for this witness to make his own statement.

The Court: Objection overruled. The witness' statement as to when this occurred will be his opinion. I will be up to the jury to determine that as a matter of fact. This is an expert witness. He may give his opinion and his reasons, but you are the sole judges of the weight to be given to any witness' testimony, including an expert.

Go ahead.

Q. (By Mr. Strachan): Is your statement that the loss on the sale of capital assets occurred, according to the books and records of the corporation, as of March or April, 1949, rather than during the prior year, a matter of opinion, or is it a matter of record? A. It is a matter of record. [2434]

Q. Can you refer to the record that you have in mind?

A. I can. I can refer to journal entry No. 37, dated July 31, 1949, of the plaintiff's books.

Q. Will you read that journal entry?

The Court: Now, just a minute.

I am going to permit this to be read, together

(Testimony of John A. Lynch.)

with any other journal entries that concern the matter, but this witness is testifying as to his opinion, and any statement that he gives is based upon other evidence in the case. The other evidence is the evidence of those facts and not this witness' statement.

Your question was improper, although what you are trying to get at is proper. I am not going to be technical on that.

This is an expert witness, and he is giving opinions. The mere fact that he tells you something is a fact hinges upon the evidence in the case. You can look at that evidence as well as he can.

Now, if there is more than one journal entry involved, I want them both read.

Mr. Dixon: I objected, your Honor, because—I didn't object, because I thought that he was going to refer to some journal entry of this court. But if he is referring to some journal entry of the books of this company, or minutes, then I do object. I think whatever it is will speak for itself.

The Court: Overruled. He may give his reasons for his [2435] opinion. His reasons will rest upon the thing that he reads. If the thing that he reads is not admissible, that is something else. But there is no doubt but what these minutes would be admissible, if they are not already in evidence.

Mr. Dixon: Yes. I am not objecting as to that, your Honor.

The Court: This is the reason for his opinion.

(Testimony of John A. Lynch.)

Is there more than one entry involving this matter?

Mr. Starchan: I would like to ask the witness. I happen to remember this one.

Is there another, Mr. Lynch?

Mr. Dixon: May I inquire as to what journal entry counsel is referring to, and with reference to what?

Mr. Strachan: The witness has identified it by number and date.

Mr. Dixon: I haven't seen it. What is it?

The Court: Step up and look at it.

Mr. Dixon: This is an entry in the books of the company?

The Witness: That is correct.

Mr. Dixon: I thought you were talking about something else.

If it is from the books of the company, your Honor, we have no objection.

I don't know what it is. [2436]

The Court: Proceed.

The Witness: The entry reflecting the loss is as follows:

Debit sales of assest's, $50,000.

Reserve for depreciation—building	$ 15,030.78
Reserve for depreciation—machinery and equipment	$ 50,144.43
Reserve for depreciation—furniture and fixtures	$ 2,910.77
Mortgage payable	$ 89,830.65

(Testimony of John A. Lynch.)

Credits:	
Land	$ 5,816.11
Building	$135,457.32
Machinery	$214,767.33
Furniture	$ 9,638.72
Tools	$ 2,450.47
Note receivable	$ 9,164.60
Debit Reorganization surplus	$169,377.32

To write off plant sold to stockholders on Apirl 3, 1949.

Mr. Strachan: Mr. Figg, is Exhibit A-6 in evidence?

The Clerk: According to my record it is not.

Mr. Strachan: I will offer A-6 in evidence.

The Court: It is page 2 of the letter, and the subject matter on page 2 is all of the matter, except the first line.

Exhibit A-6 received in evidence. [2437]

* * *

Q. (By Mr. Strachan): Do you have a copy of A-6 before you? A. Yes, I have.

Q. Does that contain any part of the books and records that you took into account in forming the opinion that the loss on this transaction occurred during and not prior to the year ended January 31, 1950?

A. May I have the question again, please?

(Question read by reporter.)

The Witness: It does not. [2438]

* * *

(Testimony of John A. Lynch.)

The Clerk: Is the journal entry BK, your Honor?

The Court: Yes, BK in evidence. This is what the witness read from.

(The exhibit referred to was received in evidence and marked as Defendants' Exhibit BK.)

The Court: All right. Go ahead.

Q. (By Mr. Strachan): You mentioned that the surplus reflected what might be called the liquidation of debt at less than the face amount thereof. Was there a journal entry on that?

A. There was.

Q. Have you that journal entry before you?

A. I have.

Mr. Strachan: Perhaps we had better mark that, your Honor, so we will know what he is talking about. [2439]

The Court: Yes, BL.

* * *

The Court: BL received in evidence.

(The exhibit referred to was received in evidence and marked as Defendants' Exhibit BL.)

Q. (By Mr. Strachan): Will you identify the journal entry that you refer to and read it to the jury, please?

A. Journal entry dated July 31, 1949, journal voucher No. 48.

(Testimony of John A. Lynch.)

Credits:

Notes payable N. J. Winckler.....$ 3,512.34
Prepaid bonus N. J. Winckler.....$20,000.00
Account receive $18,140.33

Debit Surplus from reorganization
To clear receivables owed corporation
by N. J. W. and give credit to N. J. W.
for his expense of reorganization per
agreement with Mr. Rubin.....$41,654.67

Q. Are those two journal entries, which you found in the records of the company, the reason for your opinion that these transactions should have been reflected as having occurred within the year, rather than within the prior year?

A. That, coupled with the minutes of the corporation.

Q. What minutes do you refer to?

A. I believe the minutes were dated June 24, 1949.

Q. Relating to the forgiveness of that indebtedness? A. That is correct.

Q. You mentioned one of the items included in that was an item of $10,000, do you recall that, which represented treasury stock? A. Yes, I do.

Q. Will you tell us what the books and records showed with respect to that $10,000 transaction?

A. The books and records reflect that upon termination of the escrow agreement the proceeds——

Q. Those escrow agreements were the ones through which the sale of the fixed assets were accomplished?

(Testimony of John A. Lynch.)

A. That is correct. There were two escrows, and through the termination of the one the funds were deposited with the corporation, net of trustee's expenses. They were utilized in the ordinary course of business. During the subsequent period an agreement was entered into to acquire Bernard J. Smith's stock on March 5, 1949. Bernard J. Smith [2441] was in attendance at the meeting, and the corporation approved a loan of $4,000 to Mr. Winckler to acquire Bernard J. Smith's stock——

Mr. Dixon: If the court please, I feel I must object somewhere along this line to going into all the details of this transaction. If counsel——

The Court: I have already ruled on it, that you can show what elements made up the item that was forgiven, but why it was done, or whether it was honesty or crookedness, or anything else, hasn't anything to do with it.

Mr. Strachan: When it was done is material, your Honor.

The Court: When it was done is proper. I thought you and Mr. Irwin had a stipulation as to what made up these items.

Mr. Strachan: I haven't seen it yet. He told me on the phone that he had it, but I haven't examined it.

The Court: Well, this is part of the item of 34,000 some odd dollars?

The Witness: 38,000, your Honor.

The Court: 38,000 some odd dollars that was forgiven, as it were?

(Testimony of John A. Lynch.)

The Witness: That is correct.

The Court: Which had previously been an asset on the books of the corporation?

The Witness: That is correct, your [2442] Honor.

The Court: And when it was forgiven, it ceased to be an asset?

The Witness: That is correct.

The Court: We are only concerned with the fact that the asset was taken off the books and some description of what it was.

Mr. Dixon: We have for counsel our understanding of what the $38,140.33 is composed of, if it is material. [2443]

* * *

The Court: Let the record show the jury absent.

Mr. Fisher: May it please the court, with reference to Exhibit 9, which is the one where we entered into a stipulation with respect to it, we have made a change, agreed to by Mr. Dixon and myself, in the explanation by changing the word "to" to "do" in the fourth line in the explanatory part. We have initialed it.

The Court: You have initialed it?

Mr. Fisher: Yes.

The Court: Then I will merely call that the jury's attention, and if and when they look at it, they can see what it is.

Mr. Fisher: Mr. Dixon has initialed it, too.

The Court: All right.

Mr. Fisher: Similarly in Exhibits 32 and 33.

The Court: All right.

Mr. Fisher: Similar changes were made in those exhibits, the explanatory notes to the exhibits, which have been intialed.

The Court: All right.

The Clerk: As I understand it, as to those other exhibits which we attached notes to, both counsel have examined the attachments and find them satisfactory. [2444]

Mr. Fisher: That is correct.

Mr. Strachan: The matter I wanted to discuss with your Honor has to do with the subject of income tax returns and the reporting of income tax for Federal tax purposes as compared with the computation of income according to the corporate books. There is a gap in the information that has been furnished in that we have neither had access to the books nor to the income tax returns for the fiscal year ended January 31, 1949.

The Court: Well, wait just a minute. You have had access to such records as the company kept. Whatever they had in their books, you have seen, have you not? When Mr. Hodge testified about trying to reconstruct something, you have seen that?

Mr. Strachan: I think we have, but we have not seen a copy of the income tax return for the year ended January 31, 1949. Mr. Hodge referred to that in the course of his cross-examination, but we have never seen it.

I want your Honor to understand that I sincerely mean that I am not trying to emphasize any differences between income tax, taxable net income and

corporate net income. I am simply trying to get at the facts. I know for capital gain or loss purposes, there are differences, where you have accruals or unrealized expenses.

By and large, the bookkeeping that is done for income [2445] tax purposes should coincide with the bookkeeping for other purposes, and wherever there is a disparity between taxable income and ordinary income, as shown by the books and records, the income tax return itself shows that [2446] reconciliation.

Now, I have several times offered to show what the taxable income was for the reason that we didn't have any other figure available to us. I had thought originally that if there were any adjustments of income for tax purposes necessary to reconcile it with income for other purposes, because that material is available to the plaintiff and is not available to us, that they adduce it, and I am sure they could, because Mr. Hodge had on the witness stand with him a copy of the return for this year in question.

I would like to have that made available to us, and I would like to be able to put it in.

I think it is quite important, over and beyond its probative value as factual evidence, in this: That I am afraid that the jury, because of the rulings that your Honor has made so far, and because of your Honor's explanations that the accounting was for two entirely different purposes and they were unrelated, the jury may have gotten some impressions of what the significance or lack of significance of income tax returns really is. So I would like to suggest

to your Honor that we be allowed to examine the income tax return for the year ended January 31, 1949, look at the reconciliation, and that both the corporate income for ordinary purposes and the reconciliation for income tax purposes be shown of record.

The Court: You present in a way two different problems. [2447]

One is whether the return would be admissible in evidence, and that I am certain about, for various reasons. First of all, to use it in evidence would require trying to explain to this jury something about tax laws and tax returns, and all, and we have got enough of a problem with a group of laymen to get them to follow what we have ordinarily been doing, and we would be opening up a second set of principles in certain respects.

Secondly, that period was a period in which the court through its officers operated the business, and therefore whether there was gain or loss introduces evidence too extraneous to have anything to do with the management of this company or the proper use of its facilities, and so forth. Therefore, I don't propose to admit them in evidence.

Now, in your statement you ask that you have access to this as information. Now, that is a little different. The only trouble with your request is that it may get back into what I am trying to avoid.

If, for instance, some matter was handled differently in the income tax return than it was handled in the books, reconstructed books, such as they were, I wouldn't admit the income tax return.

If there appeared thereon information that would be of assistance to you in making a reconstruction, such as Hodge tried to make, that might be different. [2448]

Do you follow me on what might be the use of it and what might not? I mean have I made myself clear? I don't mean whether you agree or not, but have I made myself clear?

Mr. Strachan: I don't know, but I would say you had. I think I understand what you have in mind.

The Court: What is your position now, Mr. Dixon, as to allowing what amounts to discovery of this return filed, reserving until, I suppose, some later ruling what use of it counsel might make? I don't propose to admit it in evidence. But suppose there was information on that return that helped explain something that subsequently appeared in the books? [2449]

Mr. Dixon: Your Honor, I am frank to say at this time when we are in the midst of trial and with the defendants, and I again say this, having been afforded full access to any and all records of this company, it seems to me that it is wholly out of order at this time to require this plaintiff to produce any further records for mere examination of the defendant in this case.

Now, with reference to the particular return, if any, that was made by this corporation for the year 1949, Mr. Hodge informs me he doesn't know whether one was ever filed for this corporation in 1949, but as far as he was concerned, as auditor for the company, he regarded that as the function of

the trustee and not the function of the corporation, since during that year the operations were carried on, such as they were, by the trustee under the supervision of the Court.

Now, to ask this plaintiff to try and again go through records, and frankly I don't know where they are, if there is one, and spend a lot of time trying to find something just on the hunch or the surmise of counsel that it might produce something that might in some remote way aid him in proving something that is alleged or is contained in the documents and the balance sheets relied upon by the plaintiff in this case, it seems to me not only irrelevant and immaterial, but it imposes an undue burden upon the plaintiff at this stage of the trial of this case. [2450]

The Court: Was any request heretofore ever made for this particular return?

Mr. Dixon: I don't know, your Honor. Your Honor well knows that whatever they have asked for, and I again say this, the trustee has, if it is available, was available, endeavored to find it and present it to them, and I think the records of the trial in this case and the material and the photostats and everything else that the defendants have of the full and complete records of this plaintiff, clearly show that they have not been denied access at any time to anything.

Now, to come in in the middle of the trial and ask the plaintiff to try to find some tax return for a year in which this company was not even being

operated as a company, was under the supervision of this Court, it seems to me is——

The Court: All right. Has a specific request ever been made for that return until now?

Mr. Strachan: We asked for access to all of the documents from the inception of the business down to date, and the ruling was that we were not entitled to those prior to the reorganization proceedings, until the first of December. Our examination of the records that were submitted to us has never shown us the existence of this return.

The Court: Do you know that it exists?

Mr. Strachan: Yes, sir. Mr. Hodge had it on the stand with him, as I understand it. [2451]

Mr. Dixon: Now, just a moment, counsel.

Mr. Strachan: And in addition to that——

Mr. Dixon: Just a moment, please.

The Court: Let Mr. Strachan finish.

Mr. Dixon: All right.

Mr. Strachan: In addition to that, the return for the succeeding year by Mr. Hodge shows what the 1949 return showed as the loss for carry-over purposes. Now, that could only have been taken from a return for the year ended January 31, 1949, and was not picked by Mr. Hodge out of the air.

Mr. Dixon: If the Court please, I don't think that that is what Mr. Hodge testified to at all. Mr. Hodge, if I recall his testimony, said that there was extreme difficulty on his part as auditor for this company in reopening the books.

The Court: Let's question Mr. Hodge.

Mr. Dixon: Yes. He is here and he can answer for himself if your Honor wants to ask him.

The Court: Do you know whether a return for Federal income tax purposes was made for the year, fiscal year ending January 31, 1950? That would be the year, would it not?

Mr. Hodge: It was January 31, 1949, the year in question, your Honor.

The Court: January 31, 1949, yes.

Mr. Hodge: I don't know if it was filed, your Honor. I built one up to get a starting point. I gave the company a [2452] copy of one, according to my records. Whether it was ever filed with the Director of Internal Revenue or the Franchise Tax Board, I don't know, but I did build one up to get a starting point for the new corporation for income tax purposes as best as I could.

The Court: The same as you tried to build up the records of the company?

Mr. Hodge: That's right, sir.

The Court: For the purposes of corporate accounting?

Mr. Hodge: That's right, sir.

Mr. Strachan: And in your return for the year ended January 31, 1950, you showed the 1949 net loss as being the figure that this return which you prepared for the prior year showed to have been the loss for tax purposes, is that correct?

Mr. Hodge: Yes, sir, that is true. I took the figure that I have built up in this return as part of the loss carry-forward computation.

Mr. Strachan: You did carry that figure forward into the next one?

Mr. Hodge: Yes, sir.

Mr. Strachan: That was on the assumption that was the amount that had been returned for the year ended January 31, 1949?

Mr. Hodge: I don't know that it was returned. I know that was the amount I computed. I did make up a return, and [2453] whether the company filed it or not, I do not know.

The Court: Well, I am going to sustain the objection on the ground that the request comes too late, that you have had access to records of this corporation and have been able to search through them and find what you wanted; that there was no specific request that I know of made for income tax returns until now; that the income tax returns are figured upon a different basis, anyhow; that you have the accounting, corporate accounting set up in the records for the succeeding year, and you had the witness Hodge available as to how he set it up; that you have equal access to the records of this Court as to whatever material might there be found as to the plaintiff, and any other valid grounds of objection made by the plaintiff. [2454]

Mr. Strachan: Your Honor, as to the request coming too late, it will not in any manner delay the trial. I believe in a matter of less than two minutes, if I have access to that return, I could make an offer of proof. And I would like to have access to it to make an offer of proof now as to what I would show if permitted to do so.

The Court: What do you think you would show by it?

Mr. Strachan: I believe I would show that there was a corporate loss during that year.

The Court: What would that tend to prove? That for income tax purposes there was a corporate loss during the year during which the Court, through its officers, operated the corporation? What would that tend to prove?

Mr. Strachan: I would show not only the loss for income tax purposes, but I would show the reconciliation between the loss for income tax purposes and the loss for corporate purposes.

The Court: The objection is sustained. You would be going into extraneous issues, and the other reasons I stated.

You have available the books as set up, you have the witness here, you could do the same kind of a job that he tried to do on reconstruction. There were accountants employed by Court officers who kept records during that time. There are Court files as to what went on. He had the problem of trying to set something up, and he has explained here how he did [2455] it.

The objection is sustained.

Mr. Strachan: One other matter that perhaps I should take up now, and that is this proposed stipulation in regard to the forgiveness of Winckler's indebtedness.

I think perhaps we need the good offices of the Court to help us straighten this out.

Mr. Irwin gave me this document this noon. It is

entitled, "Summary of Nicholas J. Winckler's Indebtedness Released by Resolution Adopted by Board of Directors of Winckler & Smith Citrus Products Company on June 24, 1949."

That is the typed heading. Somebody has changed it by interlining so that it is a summary of the "alleged" indebtedness. And with reference to the minutes it changes it from reading "Minutes of Winckler & Smith Citrus Products Company on June 24, 1949," to "January 18, 1949, and June 24, 1949."

Mr. Dixon: I will take responsibility for that, counsel.

The Court: Let me see it.

(Document handed to the Court.)

The Court: Do you have a copy, too?

Mr. Strachan: That is the only copy I have.

Mr. Irwin: Here is another copy. I thought I gave you two.

Mr. Dixon: If it please the Court—do you want to read [2456] it first?

The Court: Let me look at it, yes.

What is your dispute—merely the two interlineations made by Mr. Dixon?

Mr. Strachan: No. That is the first one. Actually, the only minutes that refer to the released indebtedness are the June 24, 1949, minutes. The January 18, 1949, transaction was only to provide what would happen if the deal did not go through, and in no way determined that the deal would go through or on what basis.

The next thing that I want to mention is that Item 1 is called "corporation checks to and/or for Louise Campbell," in the amount of $6,778.68.

The fact of the matter is that those checks while they were made payable to Louise Campbell were charged to Winckler's personal account. That was the way the indebtedness against Winckler——

The Court: Who was Louise Campbell?

Mr. Dixon: Your Honor, I am glad to go into this if we have to.

Louise Campbell was the mother of Mr. Goodland, one of the stockholders of this company at the time of its organization, I think in 1946, who, as I understand it, put up some or all of the money which her son put up, and therefore these checks were made payable, I guess, to her because she [2457] was kind of an equitable trustee or owner of the stock.

However, your Honor, if I may make this comment at this time. As the record shows in this case, I have made repeated objections to the introduction of any testimony in connection with this item. Counsel has spent, I would say, almost days here endeavoring in one way of the other to get into this record the fact that somehow on the books of this company when there were just two stockholders, a closed corporation, something was set up and charged against Winckler, which was forgiven on the books of the company. Now, let me direct your Honor's attention to this fact, that all of these items here—and counsel can't deny this, they have made an exhaustive, and exhausting, I might add, exami-

nation of the books of this company trying to find something of this kind, and the facts here antedate —I mean insofar as any part of this money is concerned—antedate the trusteeship under Chapter XI, which terminated according to the records of this Court when the sale of the corporate assets was ultimately made some time in April, ultimately confirmed, in April of 1949.

Let me direct your Honor's attention to this fact: That if these items were on the books of the company as an asset of this corporation—it is disputed —but certainly it would be the function of the trustee under Chapter XI, if this was an asset, to handle this asset and do something [2458] about it. Collect it.

The testimony is here through Winckler, the testimony is here through Hodge, that however or upon whaever basis this claim might be said to rest on the books of the company——

The Court: It was forgiven?

Mr. Dixon: ——it was forgiven.

And not only that, your Honor, but it was disposed of as part of the reorganization and the sale of the assets of this company, which had to be confirmed by the Court before the trustee could be discharged under Chapter XI.

Now, why we have to spend hours, and even days, in going into this fact, I am frank to say I just don't understand the relevancy of it, the materiality of it. [2459]

Mr. Strachan: The position Mr. Dixon takes, your Honor, is directly contrary to the position

taken by Mr. Irwin and Mr. Walker in the still pending Chapter X proceeding.

The Court: I don't care about inconsistencies. There is no requirement that counsel in one proceeding take the same position he takes in another proceeding. You are a lawyer.

Mr. Strachan: But here is a factual statement.

Mr. Irwin: May I have an exception to that statement?

The Court: You may have an exception, but I am not interested in that.

Mr. Strachan: Just getting at the facts of this thing, here is the verified petition of Mr. Walker setting up the facts, and that's all I want to establish here.

He says this Louise Campbell transaction, that she was the owner of 60 shares of capital stock of the debtor corporation.

That on or about July 9, Nicholas Winckler agreed to purchase the shares; that on July 9, Winckler caused and procured the debtor to pay with its own funds the purchase consideration which he agreed to pay Louise Campbell for said 60 shares, to wit, the total sum of $6,000, and that Winckler caused a certified to be issued to himself and later exchanged that for the other stock, and Winckler has not at any time paid the debtor or at all any part of the $6,000 purchase [2460] consideration for said shares.

And under the date of January 15, 1953, they object to the claim of Winckler.

The Court: What has that to do with it? What

does that tend to prove? The ultimate fact has been proved, namely, that there was an asset on the asset side of the ledger of $38,140, but that was crossed off, and therefore on the books of the corporation there was $38,000 less in assets. Now, that is in the record. No dispute about that, and that is the only fact I see is material.

What does all this prove that you are reading to me? Tell me what it tends to prove? What issue in the case?

Mr. Strachan: Well, it is this. There has been an attempt made to show that Winckler didn't owe this money to the corporation after reorganization.

The Court: This was brought out by you on cross. The plaintiff never offered any evidence.

Mr. Strachan: Whether it is brought out on cross or not, it is a fact, your Honor.

The Court: You can't bring out something on cross and then say you have got another issue in the case you have got to meet. If that were true, you could extend the issues of a case forever.

What does this prove, except to prove Winckler is a bad boy? It doesn't prove anything about his ability to run a [2461] citrus plant, does it?

Mr. Strachan: I think it proves he is a bad business man.

The Court: Suppose he defrauded a widow out of this money?

Mr. Strachan: This is quite different.

The Court: Suppose he made a fast deal to get these funds and never lived up to his agreement? What does that prove?

I am sorry now I let any of this go in the record about what this was and didn't limit you to the proof there was a $38,000 asset and that was forgiven and that decreased the assets of the company in that amount.

Mr. Strachan: Well, we have been trying to stipulate as to the composition of this. If we could get a stipulation, it could go in and that would be the end of it.

The Court: I have changed my mind. I am not going to let it in even as a stipulation as to what it is composed of.

Mr. Strachan: Well, if permitted so to do I would show by the witness now on the stand in part——

The Court: By your CPA, Mr. Lynch?

Mr. Strachan: That's right.

The Court: All right.

Mr. Strachan: That on March 7, 1946, Bernard J. Smith was the owner of 376 shares of the debtor's capital stock [2462] and of certificate No. 2 which the debtor issued on or about April 5, 1946, in the name of Bernard J. Smith for said 376 shares.

That on March 7, 1949, Nicholas J. Winckler, Bernard J. Smith and the debtor entered into and executed a contract in writing wherein and whereby said parties agreed that Bernard J. Smith should sell said 376 shares for the sum of $10,000 to Nicholas Winckler and/or his nominee, or that the debtor should retire said 376 shares as soon as Bernard J. Smith received said purchase consideration.

That Nicholas J. Winckler caused and procured the debtor to pay said purchase consideration for said 376 shares with its own funds.

That after the debtor had paid such purchase consideration in full, to wit, on October 28, 1949, Nicholas J. Winckler caused and procured the debtor to issue certificate No. 8 for said 376 shares in the name of Nicholas J. Winckler.

That thereafter Nicholas J. Winckler exchanged such 376 shares evidenced by certificate No. 8 for 118,477 shares of the debtor's common stock; that said 118,477 shares were shares issued to him for which Winckler has not at any time paid the debtor or at all any part of the $10,000 purchase consideration for the said shares; and that that $10,000 was a part of the $38,800 of indebtedness forgiven pursuant to the directors' resolution of June 24, [2463] 1949.

Mr. Dixon: If the Court please, before we are through with this offer of proof, I would like to ask counsel a question.

Do you represent to this court, counsel, that this witness, if called, would testify of his own knowledge of the offer of proof which you have just made to this court, or were you reading the offer of proof from a record in this court representing a claim or an application filed by the trustee in this action which was ultimately dismissed?

I would like the record to show your answer to that question. The objection, rather.

Mr. Strachan: I was reading it from the verified objections by Ronald Walker, Trustee, to the allow-

ance of Nicholas J. Winckler's claim, and it is my offer to prove substantially those facts by the witness now on direct examination.

The Court: Do you represent that this witness could testify to all those facts?

Mr. Dixon: And of his own knowledge?

Mr. Strachan: From the books and records.

I am advised by the witness he can show the payment of $10,000, that the stock transfer records submitted to him show the transfers of the stock referred to, and the records also show that the $10,000 used in the purchase of that stock was advanced by the corporation. [2464]

The Court: I asked specifically, can he testify to all the things you stated in your offer of proof? You can answer that yes or no.

Mr. Strachan: I will ask him if there is anything there he can't.

The Court: All right.

Mr. Dixon: The attorney for the trustee is right here, counsel, who filed the application that you are reading from.

The Court: Well, we are wasting time. Let's assume that he could. I have my doubts about it, but let's assume the witness could testify to those facts. We are off on a tangent again, assuming he could testify to the facts.

Mr. Strachan: That is my assumption. I was just checking it.

The Court: Your objection is as heretofore stated, on the various grounds as heretofore stated?

Mr. Dixon: Yes, your Honor; that the representation could not be supported by this witness.

The Court: And you incorporate your further objections heretofore made in discussing this?

Mr. Dixon: I do, your Honor.

The Court: Materiality, and so forth?

Mr. Dixon: I do, your Honor.

The Court: Objection sustained to the offer of proof. The clerk will mark as Exhibit BM for identification, as [2465] next in line for identification, the slip apparently prepared by Mr. Irwin and worked over by Mr. Dixon, which is what the plaintiff was prepared to stipulate to if this was material.

Is that a fair statement of what the document is?

Mr. Strachan: And which, according to my understanding of the facts and my offer of proof, is not——

The Court: You don't accept it?

Mr. Strachan: I wouldn't accept that as a stipulation.

The Court: I merely want it identified. It is not in evidence. It is merely in the record. My ruling is the same, whether you stipulated to this or whether you reworked it and put it in stipulation form. My ruling is the matter is not material to the issues in the case and your offer of proof is rejected.

The ultimate fact that has bearing is that there was an asset of $38,000 which was forgiven, and when it was forgiven the assets of the corporation were decreased by the $38,000, and that is shown in the record. There is no dispute. I am not concerned

with how that asset came into being or did not come into being. I am not concerned with whether Winckler was a bad boy or was not. [2466]

The matter, if gone into, would inject far more extensive issues which would lead us nowhere, because ultimately it all boils down to the same thing, that the asset was eliminated by forgiveness of debt.

And on the further ground that your offer of proof concerned testimony of what might be said to be the juggling of shares, which ultimately did not change the outstanding number of shares in the corporation. It is merely a question of who held the shares. And the question of who held the shares, or what they paid for them in transactions one with the other, is not an issue in the case.

You will not be precluded, and have not been precluded, from showing what physical assets were behind the outstanding shares of the company.

You have done that already, and you are going to do it for 1951, I am sure.

As to who held them, or whether one shareholder robbed another, or whether there was value exchanged between them makes no ultimate difference in the net result of so many shares outstanding, so much value behind the shares.

Those are my reasons, plus the other reasons stated in the objections of counsel.

Mr. Strachan: For the sake of having the record on this whole matter consecutive, I would like to have marked as an exhibit the Objections to Allowance of Claim that I [2467] have just referred to.

which bear a stamp mark showing Filed with the Referee on January 19, 1953.

The Court: The same objections, I take it?

Mr. Dixon: Yes, your Honor, the same objections.

The Court: Same ruling, BN for identification.

(The exhibit referred to was marked Defendants' Exhibit BN for identification.)

The Court: You are offering it, I take it?

Mr. Strachan: Yes.

The Court: The objection is sutained to it.

Mr. Strachan: Mr. Dixon did mention, in connection with that, that the objections were subsequently withdrawn?

Mr. Irwin: Dismissed with the approval of Referee Head on a showing by the trustee that he was unable to obtain evidence to sustain the allegations.

The Court: In other words, this Objection to the Claim of Winckler, which is BN for identification——

Mr. Irwin: May I state, your Honor, it was not an objection to a claim for indebtedness, but an objection to the allowance of Mr. Winckler's claim of ownership of the stock for which this money was used to purchase.

The Court: All right. The claim was then withdrawn——

Mr. Strachan: No. The objection.

The Court: The objection was then withdrawn and approved by the referee, on the representations

of the trustee [2468] that he couldn't prove the allegations?

Mr. Irwin: That is true. The showing was made before Referee Head, and he made the order permitting us to withdraw the objections.

The Court: Those are the same allegations that Mr. Strachan offered to prove by the witness Lynch?

Mr. Irwin: I presume so.

Mr. Strachan: What was the date of that order?

Mr. Irwin: I would have to look it up. Speaking very roughly from memory, it was within the past year.

The Court: Well, Mr. Lynch apparently would have been a very valuable witness to you had he been available at that time, Mr. Irwin.

Mr. Irwin: May I say that I would like to have had him as a witness at that hearing.

Mr. Strachan: I believe that the date was April 8th. Can we stipulate to that, subject to being checked?

The Court: April 8, '55?

Mr. Strachan: Yes.

Mr. Irwin: My guess was better than I thought. I think that is about the time.

The Court: So stipulated, subject to correction if either counsel wants to verify the date. [2469]

* * *

JOHN A. LYNCH

a witness by and on behalf of the defendants, having been heretofore duly sworn, was examined and testified further as follows:

Direct Examination
(Resumed)

By Mr. Strachan:

Q. Referring again to Exhibit 61, and referring to the balance sheet which is a part of Exhibit 61, you mentioned the items appearing on that balance sheet which from your examination of the records submitted to you should be explained?

A. I did.

Q. What did you say?

A. I thought you asked me if I had made the explanation. I said I had.

Q. Did you mention the deficit that is shown on the balance sheet as of January 31, 1949?

The Court: He described what made up the figure——

Q. (By Mr. Strachan): As it appears on Exhibit 61, which is the same as G? [2471]

A. That is correct, I itemized the amount to be the accummulation of the losses for the period adjusted for and to reflect the reorganization items which took place in the year ended January 31, 1950. And based on the adjustments, which I enumerated, the loss of $169,000 on the assets, and the forgiveness of $38,000, minus the accummulated loss to date, or to the beginning of the year, would be

(Testimony of John A. Lynch.)

$135,000. That would leave an approximate loss for 1949 of about $85,000 to $90,000, as shown in this deficit account.

The Court: Do you mean for the year ending January, 1949?

The Witness: That is correct, your Honor.

By the term of the deficit, accounting for all items except '49, it would indicate that for the year ended prior to this report, or for the year ended January 31, 1949, the loss would have been approximately eighty-five to ninety thousand dollars.

Q. (By Mr. Strachan): Now, will you refer to the balance sheet and income account for January 31, 1951?

Mr. Figg, that was marked once as a part of Exhibit B. I think there is probably a plaintiff's exhibit identical with.

The Court: The year ending January 31, '51?

Mr. Strachan: Yes.

The Court: 63 is a balance sheet and statement of assets [2472] and income account.

The Clerk: 63 is in evidence, except we only have one copy of it.

I beg your pardon. We do have multiple copies of that.

The Court: Pass them out.

Q. (By Mr. Strachan): Mr. Lynch, will you refer to the balance sheet as of January 31, 1951, and call attention to items thereon which, based upon your experience and examination of the records, should be explained?

(Testimony of John A. Lynch.)

A. My attention would be directed first to the ratio of the current assets and current liabilities. In this instance the current assets exceed the current liabilities by approximately $16,000. Referring back to the year previous where the current assets exceeded current liabilities by $65,000, it is obvious that the current ratio is declining. In this case the cash on hand was sufficient to pay immediate current liabilities and showed that their cash position was satisfactory.

The examination of the fixed assets reflects, and from my own examination, reflects that these assets are recorded on the books at cost.

Referring down to "Other Assets," there are questionable items being carried on the balance sheet to improve its appearance——

Mr. Dixon: If the court please, I object to those comments [2473] of the witness, "improve its appearance."

The Court: This is his opinion now. An expert witness can give his opinion.

Mr. Dixon: I am sorry.

Q. (By Mr. Strachan): Will you mention one such item and explain the reasons why you regard it as questionable to carry it as an asset?

A. The deferred promotion expense, which our examination developed was made up of advertising and salesmen's salaries, is an item which is a current expense for the year in question. The accounting system and the cost system was not such that you could have isolated any salesmen's travel or sales-

(Testimony of John A. Lynch.)

men's salary, whichever it embraced, to pinpoint to any specific product, as was set forth in the comments accompanying the report.

The comments on the report indicated that the amount represented promotional expense on behalf of citrus products, lemonade and orangeade.

Our review of the sales for the period and for the subsequent period reflect that they deferred more promotional expense than they had total sales of those products for the whole subsequent year.

Q. Is that all of that item?

A. I was going to make the statement that it is not normal accounting procedure to ever capitalize adminstrative [2474] expense or selling expense.

Q. What would be the normal treatment of that item?

A. The normal treatment would be to charge it to the income statement for the period in which the expense had been incurred. [2475]

Q. Now, is there any other item in that "other assets" classification?

A. Yes. There is an unabsorbed preseasonal expense of $22,443.

Q. Did your examination of the books and records indicate to you the nature of the items that were called preseason expenses?

A. Yes, it did. The examination reflected that this was nothing but unabsorbed overhead for the current year's business. Unabsorbed overhead is a term applied by accountants to represent the accumulation of plant expenses which was not through

(Testimony of John A. Lynch.)

their cost system taken into inventory. It represents the excess accumulated plant expenses for the year or the excess cost of manufacturing as compared to the realization from sales. It is a current expense which to my thinking it should be included as an asset and would have been taken through the inventory and those inventories in turn would have been marked down to realizable value, and it would have ended up in profit and loss either directly by a chargeoff or write-down of the inventory prior to the statement.

The Court These notes will be supplied, I take it, the same as the other ones? Maybe they are marked.

Mr. Strachan: It seems to me we had some understanding when Mr. Hodge was on the witness stand in that respect. I think perhaps the notes were made a part of the exhibit. [2476] I am not sure.

The Clerk: They are in 63-A and also in B.

The Court: We have two exhibits marked for identification, each of which has a note. One is 63-A and the other is B.

Mr. Strachan: Are they both the same?

The Court: As I see it, they are both the same. One is the defendants' number and one is the plaintiff's number. You can have your choice. Does anybody want to offer them?

Mr. Dixon: I will offer 63-A, your Honor, just to get it in the record.

Mr. Strachan: No objection.

(Testimony of John A. Lynch.)

The Court: All right. 63-A in evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 63-A, was received in evidence.)

The Witness: Further examination of this statement and of this item reflects that this is a departure from consistent accounting practice with respect to this company, without any comment relative thereto in the report.

Q. (By Mr. Strachan): Can you cite prior inconsistent treatment?

A. There was for prior years, there was no such asset as deferred promotion expenses or unabsorbed preseason expenses. If there were, they were charged directly into profit and loss for the year in question. [2477]

As I recall from the examination, this 22,000 of unabsorbed preseason expenses constituted approximately $19,268 of unabsorbed factory expenses, and the balance represented a proration of, I believe it was sales salaries, which definitely could not be isolated on the books. I may be wrong on that, whether it represented sales or plant. I think it represented sales expenses and sales travel, sales salary and sales travel. There was no way on the books one could either through a cost analysis or from information contained in the records, isolate the salesmen's expense or travel as being applicable to any specific item, whether it was grapefruit, orange juice or factory expense, for any purpose. The next item——

(Testimony of John A. Lynch.)

Q. Before you leave that item, will you tell the court and jury how that expense that is here classified as unabsorbed preseason expense would normally be handled as an accounting matter?

A. It is nothing more than the variation, or the actual cost of producing over and above what is set as a theoretical standard cost. Under a standard cost system a corporation will charge into its cost of sale a theoretical unit price for the cost of manufacture. If there is any deviation from that theoretical price, whether by price deviation or by quantity deviation, the amount is charged into an unabsorbed factory overhead expense, and then at the end of the year it [2478] is just closed into the expense account again.

Q. As profit or loss?

A. As an actual loss. If it is under-absorbed, it is taken into additional income. If it is over-absorbed, it is additional expense.

Q. Is there any other item classified as an asset that is not normally handled that way?

A. Yes, the advance to employees, $3,550. Our examination reflected that was a bonus arrangement whereby $2,000 was expensed to Mr. Winckler in June, and another $1,500 check in September, and it was charged to officers' bonus. Subsequent thereto, the items were reversed and set up as an asset.

Then subsequent thereto again they were reversed again and charged as officers' bonus again in a subsequent period.

(Testimony of John A. Lynch.)

Q. How would normal accounting procedure deal with that transaction?

A. As it was originally treated before the reversal on the books. It would have been charged as an expense, administrative expense, officers' bonus, or as a selling expense, officers' bonus, depending on which category the bonus was applicable.

Q. If those three items had been dealt with in what you have described as the normal accounting procedure, what would have been the effect on the balance sheet? [2479]

A. The aggregate of those abnormal expenses, or not abnormal expenses, but abnormal treatment of such expenses, if applied to the profit and loss for the year ending January 31, 1951, would have shown a loss of $10,000 or thereabout, as against the profit that was shown for the year of $40,000.

The total of those assets deferred, or the expenses deferred, I should say, aggregate $50,000, which was more than the profit for the period.

Q. Have you any items in the capital stock and deficit account other than the profit item that your experience and examination of the records would indicate should be commented on?

A. The deficit of January 31, 1951, as shown there——

The Court: That should be corrected to 1950.

The Witness: That should be 1950. That is what I was going to comment.

The Court: It was supposed to be corrected on all the copies.

(Testimony of John A. Lynch.)

The Jury: It is.

The Witness: I am sorry. That represents the accumulation of losses from the period beginning February 1, 1947, to date, adjusted for any reorganization expenses that took place subsequent or prior to January 31, 1949. I am referring to the capital wherein the debts were forgiven to the amount [2480] of $205,000 which had been credited there against.

The Court: You are talking now about a prior year?

The Witness: I am talking about the period from the inception of the corporation to date, after giving consideration to $205,000 of forgiveness of indebtedness.

Q. (By Mr. Strachan): So that except for that liquidation of debts at less than face value, $205,000, you have no net worth as of this date, is that correct?

A. It would be wiped out. It would be further wiped out, of course, if I took the $50,000 of deferred assets out, too.

Q. That, too, is included in the capital and surplus account? A. That's right.

The next deficit here is 62,000. The 50,000 write-off would amount to another total of 112,000. The forgiveness of 205 would make it 317,000, which would mean the wiping out of the capital stock at that date.

Q. The next balance sheet I would like to have

(Testimony of John A. Lynch.)

you refer to is that of July 31, 1951, which I suppose is Plaintiff's Exhibit 64.

The Court: 64?

The Clerk: Do you want 64 passed to the jury?

The Court: Yes. That is what you want, isn't it? Do you want 64 passed to the jury? [2481]

Mr. Strachan: Yes, please.

The Court: 64-A is the complete statement with the notes attached to it.

Mr. Dixon: Is that in evidence, your Honor?

The Court: No. It is just for identification.

Mr. Dixon: We will offer it then so the notes will be there in the record.

The Court: 64-A received in evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 64-A, was received in evidence.)

Q. (Mr. Strachan): Now, will you explain Exhibit 64, the balance sheet at mid-year 1951, referring to matters worthy of comment based on your examination of the documents and upon your experience?

A. I would again direct my attention to the current ratios, which is the current assets as compared with the current liabilities. In accountants' terminology, the corporation at this time was insolvent. It had current assets of $100,000, represented by various items, receivables, inventory, supplies, and so forth. If they had been converted to cash at that very moment for working capital purposes, they

(Testimony of John A. Lynch.)

could not have paid off the obligations which would normally come due in the 30-day period.

Reference to the cash on hand and in banks reflects there was insufficient cash to pay the payroll taxes for [2482] the period just ended.

Inventory had been pledged. The items were—the accounts receivable had been discounted. The position at this point obviously was hazardous from a financial standpoint.

The fixed assets at this stage reflects $721,000 of value. Our examination reflected this to be a hybrid of cost and appraisal.

Mr. Dixon: What?

The Witness: A hybrid, h-y-b-r-i-d.

Mr. Dixon: A hybrid. I got that, but what was the other?

The Witness: Of cost and appraisal.

Mr. Dixon: Hybrid of cost——

The Witness: And appraisal.

Q. (By Mr. Strachan): Will you describe what you mean by that so Mr. Dixon and I and the jury can understand?

A. The prior year's statements reflected the fixed assets which were purchased by the corporation during the period when they were renting the plant to be represented at cost. The accumulation of all these assets were at cost. The purchase of the plant took place in April, 1951, for approximately $200,000. The $200,000 plus the accumulated fixed assets of $97,000 were then reflected in this statement at $721,000.

(Testimony of John A. Lynch.)

Now, reference back to the prior statements will show [2483] that the tools were carried at cost on the previous balance and are also carried at cost on this balance sheet.

Reference to other items would show us that the appraisal was only applicable to certain items, and this total fixed assets figure embraces both cost and appraisal.

Q. And doesn't distinguish between the two?

A. It does not.

Q. Did you check through the appraisal with respect to certain specific assets for the purpose of ascertaining to what extent the write-up had been applied to the particular assets?

A. Yes, we did.

Q. Will you mention some of the items you checked through?

A. We checked various items. It was difficult to follow through the additions, but I remember a concentrator on the first—well, I had better check. I am not sure it was a concentrator.

Mr. Dixon: May I have the question?

(Record read.)

The Witness: We prepared a list that partially identified the items during each subsequent appraisel.

Mr. Dixon: May the record show what appraisal you are referring to, Mr. Witness?

The Witness: The first appraisal will be March

(Testimony of John A. Lynch.)

18, [2484] 1946. The second appraisal is February 17, 1950, and the third appraisal——

Mr. Dixon: Those are plaintiff's exhibits——

The Witness: ——January 12, 1951.

Mr. Dixon: 51 and 68.

The Witness: Specifically, one item I have here, a concentrator, part steel jacket, five feet zero inches diameter by 12 feet zero inches high, and further description here——

Mr. Dixon: Which one are you reading from, Mr. Witness?

The Witness: The 1946 one, page 37. Page 29 is the typed figure.

Mr. Dixon: What is the item?

The Witness: A concentrator, part steel jacket, five feet zero inches diameter by 12 feet zero inches.

Mr. Dixon: Yes, I have it.

The Witness: Is represented at a sound value of $30,000. A subsequent appraisal, February 17, 1950, page 22, a steam concentrator, steel jacket, five feet zero inches diameted by 12 feet zero inches high, 500-gallon capacity, sound value represented $65,000.

Mr. Dixon: What page again?

The Witness: Page 22 on the second appraisal.

Mr. Dixon: Page 22?

The Witness That is correct.

Mr. Dixon Go ahead.

The Witness: Do you want me to name some more, Mr. [2485] Strachan, or try to identify some others?

(Testimony of John A. Lynch.)

Q. (By Mr. Strachan): Do you have any readily identifiable there?

A. I had a few items listed, but I don't know what I did with the sheet.

Mr. Dixon: May I inquire, if it please the court, the purpose of this examination?

Is this witness purporting to question the appraisal value placed upon this particular item by the appraiser who has testified concerning the appraisal made?

I am frank to say I don't understand the purpose of the question, unless it is that. And if it is, I object because I don't think this witness is competent to testify as to value or to question values.

The Court: Well, I wasn't following too closely whether this was some item that had been appraised at five thousand and then sixty-five thousand.

Mr. Strachan: It is to show the successive mark-ups of the same piece of equipment, as illustrative of the method used by the appraiser.

The Court: There is no dispute but what there were mark-ups on the appraisal. So, therefore, nothing would be served by pointing out particular mark-ups, since the over-all appraisal resulted in a mark-up.

You don't propose to use this man as an expert witness on value—or do you? [2486]

Mr. Strachan: He is just tracing through illustrative ones to show what the appraiser did.

Mr. Dixon: Then I object.

The Court Objection sustained.

(Testimony of John A. Lynch.)

Q. (By Mr. Strachan): Mr. Lynch, what was the total amount of the write-up by appraisal method of the assets as reflected on this balance sheet, and as derived from the prior balance sheet?

A. Approximately $439,000.

Q. That was from what cost to what appraised value?

A. The cost of the assets reflected in this fixed assets section totaled approximately $297,000.

Q. And they were written up to what?

A. Written up to a net after depreciation for the period of $721,000.

Q. What was the effect of that write-up with respect to the apparent or stated net worth of the corporation as of July 31, 1951?

A. The effect of the write-up was to increase net worth by $439,000. The figure of $622,000 in the net worth section is after the write-up of the $439,000. The capital surplus here arising from the appraisal of fixed assets in the reorganization of the company represents a figure after transfer of $75,000 to the common stock to account for the 315,110 shares of $1.00 par value issued in exchange for [2487] 1,000 shares of no par value stock, which had previously been carried at $240,697.22.

Q. So that 75,000 is the difference between the old capital value of the common stock and the stated par value of the stock that was issued in exchange for it? A. Yes.

Q. Mr. Lynch, Exhibit 64 shows an operating

(Testimony of John A. Lynch.)

deficit of $201,649. Did your examination of the records indicate any matter worthy of comment on that stated operating deficit?

A. The operating deficit of July 31st is after inclusion of an operating loss of July 31st of $148,000. It represents the accumulated operating deficit which was reflected on the prior exhibit of January 31, 1951—excuse me, an operating profit of the previous exhibit of 63 and the previous exhibit in 1950 of 61. To summarize, the profit as shown on 61 of $121,000, plus the profit shown on 63 of 40,000, makes a total profit of 161,000, and a loss of 148,000 in July, 1951, would still leave a net operating profit, whereas it is shown as a net operating deficit of $201,649.17. Which indicates an accumulation from the inception of the corporation to show the continuity of this corporation as being one enterprise from February 1, 1947.

Q. So that that operating deficit goes back how far, is an accumulation from how far back in the history of the business? [2488]

A. From February 1st, 1947. [2489]

* * *

The Court: All right. The record will show the jury present in their proper places. Proceed, Mr. Strachan.

Mr. Strachan: Mr. Figg, is the income account and the balance sheet as at January 31, 1952, Exhibit 65?

The Clerk: 65.

(Testimony of John A. Lynch.)

Mr. Strachan: I want to refer to that next and have it distributed.

The Court All right. [2491]

Q. (By Mr. Strachan): Mr. Lynch, referring to Exhibit 65, I will ask you to point out, based on your experience and on your examination of the records, what should be called to the jury's attention from an accounting point of view?

A. Exhibit 65 reflects the operations and the position of the corporation at January 31, 1952.

The current position of the company at this time has been more aggravated and the current assets approximate only one-quarter of the current liabilities.

The cash figure of $2,000 is only 20 per cent of the payroll taxes which are due and payable.

The fixed assets in this report are still reflected at the appraised value, which includes the write-up of $439,000, without disclosure as to the amount of such write-up in the report accompanying the financial statements.

The capital stock and surplus amounts reflect the preferred stock at $170,000, $153,000 of which is offset by the fixed assets shown as $699,000.

The par value of common stock again reflects the par value which is after transfer of $75,000 of the write-up to the par value of the stock, indicating a paid-in amount of that amount, $315,110.

The capital surplus stated at $322,000 reflects the net of the write-up of $439,000, plus the $205,000 forgiveness of indebtedness from the prior bankruptcy, minus the loss of [2492] $169,000 in the

(Testimony of John A. Lynch.)

year ending January 31, 1950, and the $38,140 of forgiveness.

The operating deficit of 237,000 is shown exclusive of the items which I have previously commented on of $200,000, which is included in the capital surplus.

The report itself, from my previous examination, our examintion reflected that the report dated March 18 portrays the net worth of $570,000 approximately one month after the corporation had by resolution adopted a petition in bankruptcy.

The Court: The report is H for identification, the report referred to by the witness. It is not in evidence.

Mr. Strachan: In order to give it comparable treatment with the other reports, perhaps it should be 65-A.

The Court: 65-A.

Mr. Dixon: We will offer it, your Honor.

The Court: 65-A received in evidence.

(The exhibit referred to marked Plaintiff's Exhibit 65-A, was received in evidence.)

Q. (By Mr. Strachan): Is it normal auditing practice to examine the corporate minutes of a corporation under examination?

A. It is standard auditing procedure to examine corporate minutes prior to issuance of any corporate report.

Q. Is it standard procedure in such a report to make [2493] reference to any matters appearing in

(Testimony of John A. Lynch.)

the corporate records which would have a bearing upon the apparent financial condition as shown in the income account or balance sheet?

A. Disclosure of pertinent items and pertinent facts necessary for the proper interpretation of a financial statement is a tenet and is fundamental to the practice of certified public accounting. [2494]

Q. In your opinion the preparation of this report did not adhere to that?

A. It did not properly disclose facts which were essential to anyone reading the report.

Mr. Dixon: If the court please, I think he should specify what facts he is referring to.

Mr. Strachan: That is all right.

The Witness: It purports to show a net worth of $570,000 at a date subsequent to an adoption of a resolution on behalf of the officers that the corporation was bankrupt, and that they intended to file a petition in the bankruptcy Court. It reflects a $570,000 net worth one day prior to the actual filing of such petition in the Bankruptcy Court.

That is a disclosure that should be noted in the report which was issued on March 18, 1952.

Q. (By Mr. Strachan): Should it further be disclosed, in accordance with that tenet, that the major part of that net worth as stated was the result of write-ups, rather than investment?

A. The extent of the write-up by appraisal should be shown in accordance with policy formulated by the American Institute of Accountants, and as such should have been expressed in the

(Testimony of John A. Lynch.)

report. [2495]

* * *

Mr. Witness, Exhibit BB you prepared from other of the exhibits here in evidence?

The Witness: I prepared them from the reports of Mr. Hodge.

The Court: You prepared them from exhibits here in evidence, did you not?

The Witness: Yes, your Honor.

The Court: And you have limited yourself to current assets and current liabilities?

The Witness: That is correct.

The Court: And subject to correction, your figures are correct?

The Witness: That is correct. [2496]

The Court: Is it offered in evidence?

Mr. Strachan: I should like to—yes, it is offered in evidence.

The Court: Exhibit BB in evidence.

(The exhibit referred to was received in evidence and marked as Defendants' Exhibit BB.)

The Court: Now, ladies and gentlemen of the jury, this, again, is one of these exhibits for illustrative purposes. It is based upon other exhibits, other matters in evidence, so you would have to go back to the others for the actual evidence. But this is for illustrative purposes, similar to exhibits which the plaintiff used.

(Testimony of John A. Lynch.)

Q. (By Mr. Strachan): Mr. Lynch, there are three pages to this exhibit. Will you explain to the jury how the last page of the exhibit was prepared and what it is intended to show?

A. The last page of the exhibit was prepared from the exhibits which I just discussed and which are in evidence, and represents the transfer to this exhibit of the identical figures reflected on the exhibits as of the date outlined in the heading of each column. It represents the total current assets for the period subsequent to the reorganization, and it represents the current liabilities for the period subsequent to the reorganization, showing the net difference between the current assets and the current liabilities by years [2097] or by accounting periods.

Q. Taking the second, next to the last sheet, will you explain how that was prepared?

A. That was prepared from the exhibits in evidence and represents a manual transfer of the items under the current assets of the exhibits for each accounting period, and reflects, also, the current liabilities for each accounting period taken from those exhibits.

The Court: Prior to the reorganization?

The Witness: Prior to the reorganization.

The net summary of them representing the net current assets or deficiency in that current assets for each period.

Q. (By Mr. Strachan): Then the top page is

(Testimony of John A. Lynch.)

a summation of the other two pages that you have just described? A. That is correct.

Q. Will you point out what is the significance, based on your experience and examination of the records and other documents referred to, what is the significance of the facts appearing on the face of the top sheet of Exhibit BB?

A. The comparison of these schedules prior to reorganization and subsequent to the reorganization shows a definite pattern or business cycle where the deficiency—in the first instance, the deficiency and assets, current assets, accumulate to the point of bankruptcy. In the second section, which is after the reorganization, the net current [2498] assets are depleted, and a deficiency accumulates again to the point of bankruptcy.

It shows a pattern where the assets are dissipated, or the net working capital becomes deficient in each subsequent accounting period.

Mr. Strachan: I would like to have the document marked BC distributed.

The Court: Mr. Witness, BC is again made up from other financial exhibits already in evidence?

The Witness: That is correct, plus some additional knowledge that was gleaned from the books and records.

The Court: Well, that is shown in what column—the last column?

The Witness: No. In the first two columns. It is gleaned from these exhibts, but where the account

(Testimony of John A. Lynch.)

was not fully explained, we had to go to the books to find out what it represented.

Mr. Strachan: I think a little explanation is in order there, Judge.

The Court: All right.

Distribute the copies.

Q. (By Mr. Strachan): Mr. Lynch, was Exhibit BC prepared by you or under your direction and supervision? A. It was.

Q. It says that it is a comparison of total current [2499] assets and total current liabilities showing net current assets and current ratio; and it shows those by months, does it not?

A. That is correct.

Q. In the last previous exhibit, your statement of assets and liabilities was taken, as stated, directly from what we might call the Hodge audit report, is that correct? A. That is correct. [2500]

Q. Is that true of this exhibit?

A. That is true, with some refinement of items classified as other assets. In accounting terminology, current assets and current liabilities are items which would ordinarily be converted within a period of 12 months. Such current assets include prepaid rent, prepaid insurance and taxes, all prepayments which in reality would have been paid in the normal course of business within a 12-month period.

Q. Can you illustrate to the jury what difference your treatment made from the treatment given by Mr. Hodge?

A. Well, we classified the other assets of pre-

(Testimony of John A. Lynch.)

paid rent, prepaid insurance, prepaid royalties, unexpired insurance, as current assets to favor the current ratio position. They are technically current assets and we so include them.

Q. So that to the extent that you gave different treatment to the current assets and current liabilities, your treatment was more favorable and showed a stronger current position than did Mr. Hodge sometimes show, is that correct?

A. Well, that would be the result by adding any amount to the current assets, it would be more favorable.

Q. You didn't add anything to the current liabilities in any case?

A. No, I did not. There were none. The only exception [2501] from adding the total of other assets to the current assets was such items as prepaid officers' bonus, which in reality we interpreted as being accounts receivable, officers, as deferred or other assets.

The Court: You took that away?

The Witness: Such items as organization expenses, which weren't current assets, they were expenditures made at the time of the incorporation of the plaintiff, we didn't add those items. We only added strictly what in accounting terminology are current assets.

The Court: What about the prepaid promotional expenses?

The Witness: No. Those items I commented on previously, prepaid promotional expenses and un-

(Testimony of John A. Lynch.)

absorbed factory expenses, those items I commented on in previous testimony, I did not include. I only included the items which in correct accounting procedure would be included.

The Court: This is a computation of current assets and liabilities based on your judgment as a CPA as to how it should be done?

The Witness: That is correct.

The Court: In addition to adding assets you have taken away assets?

The Witness: No, your Honor. I haven't taken away any assets from the current section up here. I have only added items. [2502]

The Court: Where did the prepaid promotional expenses appear?

The Witness: It appears in other assets at the bottom. It never did appear in current assets.

Q. (By Mr. Strachan): Mr. Hodge didn't classify those as current assets, did he?

The Witness: No.

The Court: All right.

The Witness: We just added specific items to current assets.

Q. (By Mr. Strachan): Referring to this exhibit, will you explain to the jury what, based on your experience, is the significance of the showing there made?

A. The normal requirements for adequate working capital and the rule-of-thumb method is the current position of two to one is ordinary and necessary for the active conduct of a business. We prepared

(Testimony of John A. Lynch.)

this schedule to show at what point and how frequently the normal two to one current ratio was maintained or reached. This schedule shows that during the entire history of the corporation from the time of its reorganization, the plaintiff only had a ratio of two to one or better in only three months of the period. This reflects that as of March 31, 1951, the current ratio was down to 1.06 to one, which included such items as supplies and inventories normally classified as current assets and had to be converted into [2503] liabilities.

As of April 30, 1951, the plaintiff or the corporation had a deficiency of current assets in an amount of $51,343.41.

In other words, at that date it could not meet its current liabilities to the extent of $51,000, and it had gone below even the original current position at the inception of the corporation.

Mr. Strachan: If I haven't already offered Exhibit BC, I will offer it now, your Honor.

The Court: BC received in evidence.

(The exhibit referred to, marked Defendants' Exhibit BC, was received in evidence.)

Mr. Strachan: I would now like to have Exhibit BD distributed.

The Court: Distribute BD.

Mr. Witness, is BD based on exhibits in evidence here?

The Witness: As adjusted by our examination, your Honor.

(Testimony of John A. Lynch.)

The Court: All right.

Q. (By Mr. Strachan): Mr. Lynch, is Exhibit BD prepared by you and under your direction and supervision? A. Yes, sir.

Q. As I understand it, it is a comparative statement of the income and profit and loss of Winckler & Smith by years from the year ended January 31, 1950, and for the three successive fiscal [2504] years? A. That is correct.

Q. And each year's profit and loss statement is set up vertically so that they can be compared year by year? A. That is correct.

Q. Will you tell in what manner you prepared these income accounts which differ in results in some respects from Mr. Hodge?

A. Our examination of the records and books was made independent of the exhibits previously referred to, and adjustments were made by us which are reflected here. This statement reflects the segregation of the Florida operations from the California operations, and except for an adjustment on depreciation, which is cumulative through each year, the changes include the proper charge of the loss to operations in the amount of 169,000. It includes the charge of the $38,140.33 to operations, and it includes the charge in our opinion into the proper year when such charge should have been absorbed by operations. I am referring to the deferred promotional expense, the unabsorbed factory expense, and any bonus accounts. They are handled

(Testimony of John A. Lynch.)

on this exhibit in the year in which it was our opinion they were properly categorized.

Q. Take the year ended January 31, 1950. I take it that red figure at the foot of that column, $91,220.20, is your statement of the net loss to the corporation for that [2505] fiscal year?

A. That is correct.

Q. And is that based directly upon the books and records of account that you examined?

A. That is based on the books and records as we examined them adjusted for the account to which we felt the items should have been charged.

Q. Those adjustments were made in accordance with usual and ordinary accounting practices, is that correct? A. That is correct.

Q. So that the figure of $91,220 loss is the net loss for the period as shown by the books and reflected through standard accounting procedure?

A. As reflected by the books adjusted by us, the loss, as I told you before, was charged to surplus account instead of to the profit and loss account. The $169,000 did not get charged to the profit and loss account. It was charged to the surplus account. The whole operation here, including our balance sheet, is as reflected by the books, the two of them together.

Q. Now, with respect to the year ended January 31, 1951, you show there a net loss in a red figure of $14,203.20. A. That is correct.

Q. Is that again a statement of the net loss on the profit and loss statement constructed directly

(Testimony of John A. Lynch.)

from the books [2506] and records in accordance with correct accounting principles?

A. That is correct.

Q. Now, with respect to the year ended January 31, 1952, the year ended then—let me go back to the figure of 14,000. Is that the net income or loss from Florida or all operations?

A. That is a combination of both.

Q. Will you show us of what components that is made up, referring separately to the California and to the Florida operations?

A. About one-third up from the bottom of the page is an item, net income or loss, California. That represents the results from operations for the fiscal years ended January 31, 1950, 1951 and 1952 for strictly California operations.

The bottom line prior to the totals represents the net income or loss from the Florida operations.

Q. In that case the gain or loss was what on Florida?

A. On Florida the gain, as reflected from the books, was $15,824.29 for the year ended January 31, 1951, and for 1952 the loss as reflected by the books unadjusted was $10,290.82.

Q. Will you explain the year ended January 31, 1952, briefly?

A. Well, in the year ended January 31, 1952, the loss [2507] from operations, as reflected by us, for California aggregated $147,135.33. The changes from that previously exhibited here resulted from the expensing in the proper year of approximately

(Testimony of John A. Lynch.)

$50,000 which had previously been deferred and charged in 1952 operations, plus one adjustment of appreciation on depreciation. To state that briefly, if on the one hand the corporation elects to represent a fictitious, or a write-up on an asset, it must on the other hand be bound by charging the operations with the proper write-off for wear and tear on that write-up figure, written-up figure. [2508]

Q. By that do you mean that where you have written up your assets to a certain figure, that then your base for depreciation should be on the stated or book value after the write-up?

A. That is correct accounting practice.

Q. And that if you write up an asset and add some amount to the stated value of the asset over and above its cost, it is improper to depreciate on a cost basis and carry the asset on the write-up basis; is that the point you make?

A. That is right. And that is what was followed by Mr. Hodge in his first statements prior to the first bankruptcy, but not followed subsequent thereto.

Q. So you have made an adjustment to compensate for that? A. That is correct.

Q. Would you say that the net loss figure for the year ended January 31, 1952, of $157,426.15 is a correct statement of the loss as it appears from the corporate books and records when examined and accounted for in accordance with standard and normal accounting procedure? A. I would so state.

Mr. Strachan: If I haven't offered the exhibit in evidence, I will do so now, your Honor.

(Testimony of John A. Lynch.)

The Court: BD received in evidence. [2509]

* * *

The Court: These exhibits, the last two, are illustrative of the witness' opinion. This exhibit, again, is one of this kind that has a limitation. The testimony of the witness is for your consideration, and this is really a summary of his testimony. Isn't it, Mr. Strachan?

Mr. Strachan: Well, it is certainly based on it, and I believe it might be said to summarize his testimony.

The Court: The exhibit differs from some of the other exhibits that have been received in evidence. I think you understand these things.

Mr. Strachan: I would like to have the document marked BE now distributed, your Honor.

The Court: Yes.

Q. (By Mr. Strachan): I ask you to refer to Exhibit BE, Mr. Lynch, and state whether that was prepared by you and under your direction and supervision. A. It was.

Q. Will you state the manner in which it was prepared and how the facts reflected thereon are stated?

A. It was prepared from the books and records of the Winckler & Smith Citrus Products Company, and adjusted by us following our examination to reflect adjustment for depreciation and to reflect the elimination from other assets of [2510] items which in our opinion represented operating expenses for the respective years.

(Testimony of John A. Lynch.)

It was prepared to reflect the results of operation as disclosed on Exhibit BD previously commented upon.

Q. Was it prepared from the books and records of Winckler & Smith Citrus Products Company in conformity with accepted and standard accounting procedures? A. It was.

Q. I call your attention to the fact that in the surplus statement there appears to be a deficit for the year ended January 31, 1950, a somewhat larger deficit as of January 31, 1951, and a surplus in that account as of the year ended January 31, 1952, immediately prior to bankruptcy, and ask you if you can explain that. A. I can.

The surplus was created by the write-up of the assets purchased in April and reflected on the books at the increased value. The surplus thus created absorbed the previous operating losses, the cost of the recapitalization, and the gain from the forgiveness of debts from the previous bankruptcy. Elimination of the $439,000 write-up of those assets would of course have a vital effect on that black figure of $76,000 and would be reflected in a red figure of approximately $360,000.

Q. Have you made an analysis and statement of the surplus [2511] and retained earnings for the purpose of analyzing that stated surplus of $76,000?

A. I have.

Mr. Strachan: I will ask that there be distributed to the jury——

The Court: Do you offer BE?

(Testimony of John A. Lynch.)

Mr. Strachan: Yes, sir, I will offer BE, your Honor.

The Court: BE received in evidence subject to the same statement that I made as to the previous Exhibit BD. In substance this is a summary of the witness' testimony.

(The exhibit referred to was received in evidence and marked as Defendants' Exhibit BE.)

* * *

Mr. Dixon: Are you going to use any exhibits tomorrow that I haven't previously seen?

Mr. Strachan: I gave you some that we will use the first thing tomorrow.

The Court: We have BJ and——

The Clerk: There are six more of these.

The Court: BI, BG, BH——

Mr. Dixon: I have BG, BH, BI, BJ and that is all I have.

The Court: Where do you go from there?

Mr. Strachan: I have some more. The mechanical work hadn't been completed on them when I left the office this morning. Where could I get them to you tonight, Mr. Dixon?

Mr. Dixon: I don't know. I don't expect to be at my office tonight. I have a meeting that I must attend.

Do they relate to something we have already seen?

Mr. Strachan: No. It will be a different subject.

Mr. Dixon: What is the subject?

Mr. Strachan: It will be costs. [2514]

Mr. Dixon: I think I certainly should have that material in advance so it could be examined by the accountant.

Mr. Strachan: I have no objection to it.

The Court: You could go to something else tomorrow, couldn't you, so that counsel could have a chance to inspect these?

Mr. Strachan: You get over here early, don't you?

Mr. Dixon: I am generally here by 9:30.

Mr. Strachan: If I could have them here by 9:00 o'clock, does that suit you?

Mr. Dixon: That doesn't give the accountant a chance to look at this material, that is the point. I can't hope to analyze that type of material, in particular.

Mr. Strachan: If the accountant doesn't mind hopping in an automobile or cab with me, if he will come down with me I will try to assemble them tonight.

Mr. Irwin: He has been here all day and is tired.

The Court: If you can work something out, all right. Otherwise, you have enough of a case that you could go to some other matter, as we did with plaintiff's case from time to time, you could go to some other matter and then come back to this.

Mr. Strachan: I would rather keep these things together.

The Court: So would I. But pursuant to the understanding we have, I think counsel is entitled to see these. [2515]

Mr. Strachan: It is counsel's own personal arrangements and the accountant's weariness.

If they go with me, I can give them to them in the next 20 minutes. I could find them and give them to him.

Mr. Irwin says Mr. Hodge has been here all day and he is tired. I have been here all day and I am tired, but I could still get the exhibits tonight.

The Court: If you could get them to counsel's office by 5:00 o'clock, that will be satisfactory. But I don't think you can.

Mr. Strachan: Where is the office?

Mr. Dixon: Subway Terminal Building. It is downtown.

My only inquiry, counsel, is that I just can't hope to work with those exhibits unless I have them a day ahead of time.

Mr. Strachan: There was no understanding that we would have our exhibits ready in their hands before adjournment time. I said I would do the best I could.

The Court: I don't know about you, but I said I wanted exhibits on either side turned over beforehand, so we wouldn't have this business of them coming up and somebody wanting to see what is this, and let me read it, and all that sort of thing.

Mr. Strachan: If counsel will ride with me in a cab to my office right now, I will give them to him, and pay his cab [2516] fare over to his office.

The Court: If you have got them ready. If not, deviate from your method of presenting your case to put something else on out of order.

Mr. Strachan: I won't use any exhibits tomorrow that I don't give him tonight.

Mr. Dixon: Fine. Thanks a lot. [2517]

* * *

Thursday, January 19, 1956, 9:55 A.M.

The Court: The record will show the jury absent. Does somebody want to present something?

Mr. Dixon: Yes, your Honor. I would like to take up with the court the general subject before we proceed with the jury of the proposed summaries which have been handed to me since yesterday and their use in this case.

It has been my understanding up to this point that when the witness was testifying concerning mathematical computations which he made, a summary could be given to the jury for the purpose of summarizing his computations, showing how they were arrived at; and so forth.

Now, I don't know what use at this time the defendants expect to make of some of the documents, or for what reason the exhibits have been submitted to us since last evening's close, or yesterday's close, but I would like to present some of them to the court at this time, because I feel that some of them are clearly incompetent for any purpose.

I think if the defendant intends to pass them out to the jury at the time he starts the examination with reference to this, that it would only add to confusion, would necessitate my objecting at that point to not only the use or the presentation of the sum-

maries to the jury, but at least I would feel I should at that time inquire, if possible, into the [2520] basis of some of these so-called summaries before they are even used by the witness.

Now, some of them, I feel, are clearly incompetent and are not summaries. In other words, so that I may make my position clear, your Honor, the plaintiff will at any and all times stipulate to any mathematical figures here that we have had an opportunity to check, I mean just figures for the record. I did that in presenting our case and counsel so stipulated to a lot of statistical material, but it seems to me it is going to be placing undue emphasis upon the defendants' part of this case with reference to these exhibits if, in addition to the oral testimony on some of these matters, the jury is going to have what in fact is not and could not possibly be construed in many instances as a summary at all of statistics or other mathematical data that the witness may have testified to.

Now, to become specific, we already have marked for identification BH.

The Court: I don't know if I have that. Yes. BH.

Mr. Dixon: In the first place, any testimony at all with reference to any of the figures contained herein would be objected to by the plaintiff as being wholly irrelevant and immaterial, and not tending to prove or disprove any of the issues of this lawsuit. If it should develop that it was material, some of the facts here might possibly be stipulated [2521] to, but certainly not in the manner and form in

which this BH has been headed, because the obvious inference to be drawn against the plaintiff by even the wording here is clear. I don't think there is no need for a summary of that kind of information, if it is proper evidence in this case.

In other words, I don't think that type of computation or information comes within the scope of the type of summary that the plaintiff has been using with reference to the testimony of Mr. Hodge as to how he arrived at his estimated profit figure on the 12,000 tons.

The other exhibits, as your Honor knows, are actual balance sheets and operating statements of the company and are not summary exhibits.

Second, we have this Exhibit BG, which purports to be a schedule of fixed assets starting at January 1, 1947, and then a total in 4/51, in other words, April, 1951. I assume the purpose of this is to show some kind of a mark-up. Well, it has already been testified and it is not in dispute that there was a mark-up in this case. But, frankly, I would have to object to the use of this even by this witness until it could be determined, I mean as far as the jury having it, at the time the witness is testifying concerning any of these figures, until it could be determined that this made provision for the increase or additions to the assets of this company by way of capital purchases of machinery and equipment and [2522] other things which obviously are not reflected——

Mr. Strachan: Those are shown there.

Mr. Dixon: No, they are not.

Mr. Strachan: They are shown in the second column, net cost additions.

Mr. Dixon: There is nothing here.

Mr. Strachan: It shows buildings and machinery.

Mr. Dixon: Those figures purport to be as of 1947, if I read them correctly, and there is nothing shown between those dates, from January 31, 1947, to March of 1951. It is all zero in the column under net cost additions, if I read this correctly.

Mr. Strachan: That will be explained.

Mr. Dixon: I am not concerned about explaining it, counsel. I am here to say I am objecting to distribution to the jury to this kind of an exhibit while the witness is testifying to it. It could only mislead——

The Court: Weren't there additions between 1947 and 1951?

Mr. Dixon: Over 100 and some odd thousand dollars, your Honor, actual capital expenditures.

The Court: Wait a minute.

Mr. Strachan: That will be explained, your Honor. The lower vertical group of figures there shows the assets in April, 1951. That is the date of the reacquisition of the [2523] plant for $200,000. The witness will explain that the difference between the 200,000 and the 97,900 are the additions at the April date. Both of these are as of a single date and so necessarily there are no additions at that date.

Mr. Dixon: Further, your Honor, we have not had an opportunity to check this and we couldn't have. It would take us an insurmountable amount of time. For example, this does not bear any rela-

tion to any of the balance sheets of the plaintiff corporation. The date fixed here for assets as of April, 1951, if I read this exhibit correctly, certainly does not show on its face in any sense of the term that there is any provision for it, and I don't want, therefore, to take the time, and I don't think it should be injected into this case, and therefore I do object to its use on that basis before an explanation is made.

If counsel wants to have a stipulation on certain of these facts of the write-up, if they will submit that to us and we have a chance to check it, we will agree to such a stipulation, but I could not agree to the use of this exhibit for that purpose.

Coming next to BI, I am just running over some of these exhibits to illustrate my point——

The Court: BI? All right. [2524]

Mr. Dixon: This purports to relate to withdrawals by the president of the plaintiff company for salary, bonus, forgiven debt and expenses, during the period from February 1, '49, to January 31, '52.

Assuming this to be true—and we certainly see this item here that has been put in, forgiven debt, and the language, and there is something here on allowances—we would have to go into what those were for, and I utterly fail to see any relevancy or materiality to this exhibit or any of the contents contained therein.

If the witness wants to testify, if it is material, that from examination of his books it shows that Winckler took or received a salary set forth here,

that is the test of it, and how would that be material in this case?

I would like to ask what is the salary of Mr. Armstrong, but what materiality would it be to this case, except compare the differences between the two.

And the forgiven debt provision here appears again. We have been spending at least three or four days on that question, and here we see it again coming in through the back door, if this exhibit is even submitted to the jury, while this witness is permitted to testify concerning it.

Then we have some new ones. These are the ones we got yesterday but didn't have a chance to examine them until after the close of the case. We were handed this one—— [2525]

The Court: What is that?

Mr. Dixon: These have not been identified, your Honor, but I assume they will be. Maybe before we talk about them they should be given an identification mark if counsel expects to use them.

If they don't expect to use them we will say nothing about them.

Mr. Strachan: I expect to use all of them, yes.

The Court: Mark them for identification.

Mr. Dixon: Let's mark them for identification so I can talk about them, if you expect to use them.

We got this morning some additional ones. They may be correct. Statistics on Government oranges.

We will be glad to stipulate that any governmental figures on anything may be admitted, if relevant. They are subject only to that objection.

But to get back to these other exhibits——

The Clerk: Temporarily we can just mark one, pending a ruling on the distribution to the jury.

The Court: Do it this way: Can't you just mark the outside of the cover?

Mr. Strachan: I have my own markings on that.

The Clerk: Couldn't you just give me one of each exhibit?

Mr. Strachan: Yes. I am handing the clerk——

Mr. Dixon: Are you going to mark them all, counsel? [2526]

The Court: Just one to start with, and you can see which one it is.

Mr. Dixon: I had these three in mind.

Mr. Strachan: This document is entitled Sales of All Products Excluding Florida Operations Year Ended, showing three columns for the years ended, fiscal years of '50, '51 and '52.

The Clerk: That is Exhibit BO for identification.

(The exhibit referred to was marked Defendants' Exhibit BO for identification.)

Mr. Strachan: Your office got that one before 5:00 o'clock last night.

Mr. Dixon: What is the number of that?

The Court: BO. The next will be BP.

Mr. Strachan: BP is a document entitled Purchases of Raw Fruit, in Tons.

(The exhibit referred to was marked Defendants' Exhibit BP for identification.)

Mr. Strachan: BQ is entitled Purchases of Raw Fruit According to Source of Supply, in Tons.

Mr. Dixon: I thought that was BP.

The Court: BP is a long one like this, and BQ is the short one.

(The exhibit referred to was marked Defendants' Exhibit BQ for identification.) [2527]

Mr. Strachan: BR is a photostat of a record entitled Winckler & Smith Citrus Products Cost Analysis, Month of September, 1951.

(The exhibit referred to was marked Defendants' Exhibit BR for identification.)

Mr. Strachan: BS is entitled Statement of Projected Results of Operations by Winckler & Smith Citrus Products Company on Processing 12,000 Tons of Valencia Oranges under TreeSweet Contract Terms.

(The exhibit referred to was marked Defendants' Exhibit BS for identification.)

Mr. Strachan: BT is Combined Statement of Income Including Actual Results for Year Ended January 31, 1952, and Projected Results of Processing 12,000 Tons of Valencia Oranges under TreeSweet Contract Terms.

(The exhibit referred to was marked Defendants' Exhibit BT for identification.)

Mr. Strachan: Those are documents which were delivered to the office of counsel for plaintiff before 5:00 o'clock yesterday afternoon. In addition to that, I understand that we have delivered to him some

additional documents today, and I think we may as well have those marked.

The Court: All right.

Mr. Strachan: Before I go to those, your Honor, I might mention this: [2528]

On BJ, as it was originally marked, we showed references to the source of the figures as being certain exhibit numbers, and we used the defendants' identification numbers on certain exhibits, which were later admitted under plaintiff's markings. So I have had a revision of BJ made to change only the identification and make it correspond with the documents in evidence.

If it is satisfactory to everybody, I would suggest that I be permitted to substitute this revision.

The Court: BJ is only marked for identification, it is not in evidence, so you can substitute the set that you now have for the set the clerk has. Is that what you mean?

Mr. Strachan: But there have been copies of that marked for the jury, too.

The Court: But the jury haven't seen that yet.

Mr. Strachan: If we could make the substitution right now. The only alteration, I think I can point it out—BJ as it is now marked refers to, in the last three items, F-1, G and B. I have changed that to 59, 61 and 63. [2529]

The Court: Just make the substitution. Pull out the old BJ's that have only been marked and put in the new BJ's. Nobody has seen the exhibit. There has been no testimony.

Mr. Strachan: Fine. I would like to do that.

The Court: All right.

Mr. Strachan: This is a draft——

The Court: What is this? What is the number?

The Clerk: It is something new.

Mr. Strachan: This document I am now asking to have marked is a draft of average prices f.o.b. Florida from 1949 to 1951, attached to which is the statistical data that is represented in graphical form.

The Clerk: That will be BU, your Honor.

The Court: BU.

(The exhibit referred to was marked Defendants' Exhibit BU for identification.)

Mr. Strachan: We don't have an extra copy of this even for ourselves.

Mr. Stark: We will have them this afternoon.

Mr. Strachan: The next document is called Production, Juices, Packs and Season Closing Prices Paid by Canners for Florida Oranges 1948-49 to 1950-51.

The Clerk: BV for identification.

(The exhibit referred to was marked Defendants' Exhibit BV for identification.) [2530]

Mr. Strachan: The next document is entitled Florida Oranges, United States Department of Agriculture Official Crop Estimates, 1950-1951, by Months. There is a manual correction to January, 1951, on this exhibit. The exhibit will be rerun and the correction will appear on the printed copies we finally get.

Mr. Dixon: Then do you want to mark it at this time, counsel, or we will hold it?

The Court: We will save the number and don't submit it until later.

Mr. Strachan: I think for our discussion this morning you might look at it, your Honor. There will be only the one change.

(The exhibit referred to was marked Defendants' Exhibit BW for identification.)

Mr. Strachan: The next document is called Valencia Orange Purchases 1950, Mutual Citrus Products Company, and the second page is the same data for 1951.

The Clerk: BX for identification.

(The exhibit referred to was marked Defendants' Exhibit BX for identification.)

The Court: When did the defendants decide to introduce this mass of documentary charts and exhibits?

Mr. Strachan: Well, I don't know when the decision was made. I would say as to this last series that I have had [2531] marked and that Mr. Dixon received only this morning, the decision was made last night because of the availability of a witness that I expect to put on out of order.

The Court: And do you think that deciding last night to prepare charts and then throw them at the plaintiff at this stage of a case comports with the idea of pretrial and how a case of this kind should be tried?

Mr. Strachan: They are Department of Agriculture figures. They have been stipulated so far. I hadn't realized they would be put in——

The Court: You are talking now just about these Agricultural figures?

Mr. Strachan: The group that was just marked that I said had just been delivered to him this morning, yes, sir.

The Court: I am talking about this entire group, starting out with actually BA, some of which are already in evidence, and on down through. When was the decision made to use this type or propose this type of documentary evidence?

Mr. Strachan: Well, a good part of it was decided upon, your Honor, after Mr. Hodge's testimony. Certainly all of those dealing with cost were computed after we had had Mr. Hodge's testimony, knew what the plaintiff's theory of damage was, and after we had had an opportunity to examine, cross-examine on Exhibit 69-A.

The Court: Certainly you knew the plaintiff's theory [2532] of damages, that they proposed to use the financial records of the company, that they proposed to rely upon the TreeSweet and the Silzle contracts, and that that was their theory of damages. You have known that from the beginning.

Now, at this stage in a long case with a jury trial to inject a series of, I don't know, 15 or 20 documentary exhibits, some of which you admit were delivered to counsel at 5:00 o'clock last night, and all of which to date have never been shown to the plaintiff during any of the pretrial proceedings——

Mr. Strachan: And I can tell you the reason why, your Honor.

The Court: Why?

Mr. Strachan: Because we did not realize the theory of damages that the plaintiff was going to adopt as being that there would have been an overall profit on the year's operations if 12,000 tons had been processed by Winckler & Smith under the TreeSweet contract until your Honor asked the witness, "Now, I want to get this straight, is this the profit on 12,000 tons, or is it a profit for the year?"

That is the first intimation we had of that.

Exhibit 69-A was given to us with the witness on the stand, without 30 seconds' opportunity to examine it or analyze it. It was distributed to the jury with some very obvious improprieties in it. It was revised and redistributed [2533] again, and it is still subject to redistribution. I want to say it is one of the most difficult documents to analyze that I have had to deal with in this case or any other. We spent hours and hours trying to develop what the theory of that was, and I will tell you in regard to these documents that were delivered to Mr. Dixon yesterday that the computations on those were not finished until the night before last and I didn't see the finished product until yesterday after court adjourned. I had seen the drafts from which they were printed.

The Court: Well, I have got several comments to make on that. First of all, if you didn't know that the plaintiff's theory of damages would be to

proceed on the basis of their financial statements, the trial brief indicated that, plus the fact that their whole contention throughout the case was that had they gotten a contract for Winekler & Smith like TreeSweet or Silzle, they would have made money and not gone broke, that has been in the case from the very beginning, then I underestimated the ability of the firms of attorneys representing the defendants.

Next, No. 2, the document you speak of on the question as to whether it was 25,000 profit for that lot or whether it was a profit for combined operations, we had a rowdy-dow here, I concede, but you asserted a proposition which I think was untenable and which I think you yourself backed [2534] away from, namely, that the exhibit showed a profit on only the operation when it was obvious the witness was trying to show a profit on combined operations. So much for that. That is that exhibit.

You are probably correct in saying that it was not delivered previously, and it should have been. However, it is one exhibit and it was on a theory which has been in the case from the beginning.

Now, with that, I suppose, as an opening wedge, you then throw at the court and counsel, and you deliver to him the night before document after document on this problem.

Now, I am not going to sit still for this kind of documentary evidence. If you want to put in a corresponding document to analyze what they did with 69, you may do so, and you can, of course, put in documents concerning figures of the Department

of Agriculture and things of that sort, which, of course, counsel has been prepared for.

This has been a sad case in many ways in that our pretrial procedures were disrupted and we didn't get to accomplish all that could have been accomplished, but inherent in all the proceedings was the fact that each side was to know what the other side was going to do about this case.

With the exception of 69, which we have already talked about, there has been nothing I know of that the plaintiff has offered here that in any way is comparable with what the [2535] defendants now propose to offer in this case. That isn't the way you try a two or three-day case in the federal court, and it isn't going to be the way we try a jury case that has already gone over a month.

Mr. Strachan: I insist, your Honor, that there has been no lack of diligence on our part in preparing and immediately releasing these exhibits. We spent a large part of the adjournment between Friday and Tuesday trying to determine from Mr. Hodge's cross-examination on 69-A wherein lay the fallacies and the errors, and we did not come to any conclusions on that until some time Monday, and the accountants then proceeded to prepare their data based on considerable revision of anything that we had considered before, and we finally came up with these exhibits. They are the first and only exhibits we have ever prepared on the subject of loss of profits and these damage items, and I will say that Mr. Dixon had them within a matter of

24 hours after the decision as to how they should be prepared was arrived at.

The Court: I advised counsel as this trial progressed that I wanted these exhibits that were to be used to be exhibited beforehand. We talked about that time and time again. I know of no instance where the defendants were taken by any surprise by the evidence that was put on by the plaintiff.

Mr. Strachan: I was taken by surprise.

The Court: With the possible exception [2536] of 69.

Mr. Strachan: 69 came as a great surprise. A large part of these have been prepared in haste in order to analyze and rebut the contents of 69 and the implications. [2537]

The Court: No complaint was then made by defendants as is now made by the plaintiff. And there is a lot of difference between one document, where the witness is available for cross-examination, and a multitude of documents tossed into the hopper with the presses working the night before, and then colloquy like we had last night, where you say, "Well, if you will come down to the office I will give you what I have right now and give you some tomorrow morning."

You can't try lawsuits that way.

Mr. Strachan: I didn't tell him that. I said he could have them last night if he would simply go to the office. Your Honor said it would be all right if the documents were delivered to his office by 5:00 o'clock, and Mr. Fisher and I got them delivered there before 5:00 o'clock.

The Court: I didn't know how many documents there were.

Certainly I am going to try to go along with counsel in their problems, but I am saying now that I am surprised that this is the way Pope and Ballard think an antitrust case ought to be tried, or any case ought to be tried, where documentary evidence is involved, in the Federal Court.

Mr. Strachan: I will say this, your Honor, with all due deference to the aspersions cast at me—and you have the right to cast aspersions if you want to—but I know of no other way in which I could have prepared adequately to represent my client other than what I have done here. And [2538] I have done my utmost. We have worked under extreme pressure, and I don't know of anything else that could have been done.

I have delivered these documents to Mr. Dixon at the earliest possible moment. I prepared them at the earliest possible moment. And I assure you on my word that that is the truth.

The Court: I understand that most of these documents that we are talking about, with the exception of such things as official figures on sales and production, and things of that sort, are in defense or rebuttal, as it were, of 69, Exhibit 69?

Mr. Strachan: I don't think it is all 69. If you want to go over them seriatim I will be very glad to do it.

The Court: One thing more. It has been common practice in this court and in other courts to permit, in cases that involve a series of figures, a

summary of evidence already in the record. That is how we started to talk about this, and that is how eventually the TreeSweet and Silzle exhibits were drawn, based upon testimony in the record.

The rule that permits that to be done doesn't permit this type of thing, a multitude of documents.

In some of the most complex cases involving a number of figures and situations of that sort—and I have in mind income tax prosecutions—it is not a multitude of documents submitted at the last minute, it is a summary prepared after [2539] a witness has testified, boiled down in some capsule form, of the computations.

Now you are stretching the point further in this matter. And much of this matter obviously is, as it were, a recordation of the witness' oral testimony.

Last night when I admitted two of these I was a little puzzled at the time. If you look at the record, we had admitted previously some exhibits that were compilations of things in the record, and as to a couple that I admitted I had to tell the jury that in substance this was, as it were, a recordation of the witness' testimony.

That doesn't come within the general rule or practice of a summary of figures to assist the jury in summarizing the whole picture.

This type of thing would serve no purpose except to utterly confuse a jury, and I don't intend that this case be tried on that kind of a basis.

On various counts I think this is wrong.

First of all, documentary evidence that was to

be used was to be made available to plaintiff, just as what they used was to be made available to you.

Mr. Strachan: I don't agree that it was made available to me, in the first place, and I say we did comply with that, your Honor, by giving it to them at the earliest possible moment. [2540]

The Court: With the exception of 69. And as to 69 there is no doubt in my mind that you are entitled to prepare some similar computation as to how you figure the matter, to even up or rebut on 69.

No. 2, most of these matters, or many of them, which we can sort out, are matters of recording the testimony of the witness.

In addition—I don't need to summarize what I have heretofore said. I don't need to go any further on it.

Mr. Strachan: I would suggest this, your Honor: Instead of talking about a mass of documents, that each document can be made to stand on its own foundation, and I think can be rendered admissible.

I think if we conformed to the practice that was followed by plaintiff, of showing his unqualified documents to the jury before foundation was laid, that I should be permitted the same practice. If your Honor——

The Court: Now, wait on that. We would have to go back over the record. If that was done, it was done with consent, because ordinarily that is not the way it is done. You will have to point out in the record to me where that was done, because the practice is, and I have tried to follow it, that

these exhibits should be in evidence before they go to the jury.

There are exceptions. [2541]

I think you will find there was a situation where it was conceded the document would go into evidence, beforehand, without any argument.

It is not the practice to exhibit any document to a juror. And if you recall, as the plaintiff's case went along, there would be something identified, and occasionally somebody would want to read from it, plaintiff would want to read from it, which I didn't permit until the document was in evidence.

Mr. Strachan: When I acquiesced in the practice that was followed, I assumed that it would be followed throughout the case and in favor of both sides.

The Court: Which documents do you refer to were exhibited to the jury before they were received in evidence?

Mr. Strachan: Well, I could go back over quite a number of them. 69-A is an outstanding example of that.

The Court: 69-A?

Mr. Strachan: Or 69. I don't know.

The Court: Let's talk not about examples, 69. What other documents?

Mr. Strachan: I can name some others. I think the whole series 67, 66, 65, 64, 63, 62, 61, 60—I believe all of those.

The Court: First of all, the majority of those with three exceptions were the financial statements of the company, which you have had access to for three or four years, and [2542] which you have been

studying, and which was conceded would be properly put in evidence, which you were told in the plaintiff's memorandum, pretrial memorandum, they were going to rely upon their statements of operations, and so forth.

Now, I would have to check the record as to each of these to see what actually did happen. But as to those, they stand in an entirely different category than the mass of material that you have submitted here.

Mr. Strachan: One other thing that I want to say on the plaintiff's theory of damages. It wasn't until last week end that I realized that there had been in Hodge's testimony, and in Exhibit 69, such a shift of position as there was. Partly that was because even on 69 itself an item was designated Profit on 12,000 Tons, and it took me a long time to realize that that wasn't really the basis of that exhibit. It took the accountants a long time to convince me on that.

The Court: I am a dumb lawyer, I never had a course, except in high school accounting——

Mr. Strachan: I never even had that.

The Court: ——and it took me about 15 minutes up here, hearing what was going on, to determine what it was.

I concede it was poorly prepared and it was misleading, but it didn't take me very long to see what had happened.

I have a lot of respect for men like Mr. Lynch here, a CPA with a lot of background. I can't be-

lieve that a man who [2543] is a CPA couldn't see what I could see in just a few seconds.

Mr. Strachan: Perhaps he saw it, but it took him, I would say, 48 hours to put it through my head.

And I think that that is a departure and a shift in position from the statement contained in the pretrial brief or the trial brief, I have forgotten which it was, and also in the letter which Mr. Dixon wrote outlining what his theories of damages were.

I was misled by those things.

The Court: I have understood this case all along was a case based upon the contention that TreeSweet and Silzle had been given a favored position by contracts they had with Sunkist, and that a suit had been brought by the plaintiff in this case against Sunkist for treble damages on the ground that they had been damaged by these contracts, and that if the contracts had not been in existence—no, that is not correct—and that the only way that they could complain about the contracts was that TreeSweet and Silzle got them and they didn't; and, therefore, if they had gotten such a contract on a fair basis, without discrimination—the Clayton and Robinson-Patman Acts—that the plaintiff would not have suffered damages and gone out of business.

That the gist of plaintiff's case from the beginning was the preferential treatment and what would have happened if plaintiff had been treated the same way. [2544]

Whether plaintiff comes in and says, Let's take

12,000 tons, or 1,000 tons, doesn't seem to me to make a lot of difference in the problem.

Mr. Strachan: But it seems to me it does make a difference whether he comes in and says, "I would have had a profit on processing 12,000 tons, as an individual transaction, of so much money," or whether he comes in and says, "I would have had a profit from processing 12,000 tons that would have absorbed $184,000 of loss and given me a net profit for the year."

That is just the disparity between what I understood originally from the trial briefs and Mr. Dixon's letter to us explaining his theories of damages, and as I say, it took perhaps 48 hours after 69 had been introduced for me to become oriented to that shift of position.

Until I had become oriented I didn't know how we wanted to prepare to meet Hodge's testimony of 69.

The Court: You certainly will have time to decide how you are going to meet it, and you may use a computation, likewise, but we are not going to use a bulk of exhibits to purportedly meet a calculation made of Exhibit 69.

Assume that you were surprised and misled because of the wording of the document, you are not misled now. You know what they are contending. You have known it since the thing got straightened out on the afternoon when you suggested that [2545] we go to some other matter and you might further study it.

Mr. Strachan: I wasn't straightened out then.

That was last Friday. And it wasn't until sometime Sunday night that they had me straightened out.

The Court: You first then began to have some doubt about what your position was?

Mr. Strachan: That is right.

The Court: You don't have to do that today or tomorrow; you can do that before your case ends, make some computation as to your figures on 69.

Mr. Strachan: That is what was done. It is that that Mr. Dixon is objecting to this morning.

The Court: We are not going to do it this way. Make a computation and submit it at the earliest moment to Mr. Dixon. Give him sufficient time to study it, and then go into it.

Mr. Strachan: The computations which we have made are among those which we have had identified here and which were submitted to Mr. Dixon yesterday.

Your Honor, I don't want you to think that I am trying to play fast and loose with the court in what I propose to do, so I intend to tell you, that in view of the fact that the propriety of distributing these exhibits to the jury prior to their qualification has been questioned, and apparently your Honor is not going to allow that to be done [2546] while the qualification is being made, I propose to, with the witness now on the stand, and with respect to other exhibits and subsequent witnesses on the stand, to qualify, have these marked documents explained, the manner of preparation described, the sources used, and then offer them in evidence. I think it would be helpful to the jury if they could follow

the discussion with the documents before them, but as your Honor says, that is not customary practice, so I will proceed, if your Honor will not allow them to be distributed, as if we were following the ordinary rule that the foundation should be laid before they are exhibited to the jury.

Do you see any impropriety in that, your Honor?

The Court: I am not as concerned with that proposition as I am with the major proposition as to whether you are going to use this at all.

I want to go back and check the record as to what exhibits were handed to the jury without being admitted in evidence. But I am not too concerned with that. If it is going to be apparent that an exhibit can go into evidence, that is a matter of form. [2547]

I am not concerned with your attempt to make a calculation in rebuttal to Exhibit 69, but this flood of documents. I informed you at the time that 69 was being used that you might make a computation. I didn't say you could make 50 computations and run the presses overnight and give them to counsel at 5:00 o'clock and expect to go ahead the next morning with these exhibits.

That's the main thing in this case, this mass of documentary evidence without the matter having been exhibited to counsel or without counsel being informed it was to be used.

Mr. Strachan: I don't think there is anything in this that should have a tendency to surprise counsel for plaintiff. If we examine the documents step by step, all of them build up, one after the other, on

facts they have known or should have known from their books of account, facts which I think Mr. Hodge knew or could have known, advised or could have advised plaintiff's counsel on. I don't think there is anything wrong in what we have done, and I don't think there is any element of surprise justified to be claimed by counsel for plaintiff.

The Court: What is Exhibit 68, Mr. Clerk?

The Clerk: The appraisal.

Mr. Dixon: That was the 1946 appraisal, your Honor.

The Clerk: The computations are 66 and 67.

The Court: 66 is what? [2548]

The Clerk: 66 is a computation on Silzle. 67 is a computation on TreeSweet.

The Court: I don't know whether I have all the transcript or whether the plaintiffs are using some of it. Are there other copies of the transcript available here?

Mr. Strachan: Which transcript do you want, your Honor?

The Court: I want to go back and check these 60 exhibits and what happened as they came into evidence. The transcripts you have borrowed are probably at your office?

Mr. Dixon: Mr. Walker has them.

Mr. Strachan: Your Honor, I think I have a set here. Where would you like to start?

The Court: I have to check back and see when we started with this 60 series.

The Clerk: January 10, your Honor.

Mr. Strachan: Your Honor, while we are getting

the transcript together, there is another matter I would like to mention, that is, that we were discussing the avilability of the income tax return for the year ended January 31, 1949, yesterday. I was asked whether we had ever specifically asked for that before. I was not able to give a direct answer because I did not recall the record. So we had the record checked last night and found that in a notice of motion for discovery and production of documents under Rule 34 which was dated February 19, 1954, item 11 calls for the production [2549] of copies of federal income tax returns and supporting exhibits filed by the plaintiff for its fiscal years ending in 1949, 1950, 1951 and 1952, and that by an order entered, I believe it was filed April 14, 1954, the plaintiff was ordered to produce those documents.

That income tax for the year ended January 31, 1949, has never been submitted to us pursuant to that request and order.

The Court: Thank you for calling it to my attention. I doubt if it changes my view on the admissibility of the return.

Now, I am going to bring the jury down and excuse them until 2:00 o'clock. I have got some work I want you gentlemen to do while I am going over some of this matter.

Bring the jury down, Mr. Bailiff.

What I want counsel to do while I am looking through this to refresh my recollection about it is to start out with this BA list on down through the numbers which have been identified today and pre-

pare for me a list in a few minutes of those exhibits which are purportedly in rebuttal to or connected with Exhibit 69.

Secondly, those which are on other subject matters.

From plaintiff's counsel I want a statement as to those there will not be objection to, such as reports from government agencies and so forth, which the plaintiff may or may not object to. I want to know the plaintiff's position. [2550]

I want to know the defendants' position as to what they particularly propose or what you intend to prove by them. By that I mean are they intended as rebuttal to 69, and so forth?

Then I want a definite understanding as to what is to be done with exhibits from here on out. If necessary, I will take a recess of this jury for a week and hold a pretrial and make you say to me which exhibits you intend to use, to see if I can't say to counsel I want these exhibits that are going to be used to be exhibited to the plaintiff. If it is a matter he knows about and you say, "We are going to use financial statements of such-and-such and minutes of meetings," and so forth, that is one thing, but in common decency both sides should know what the other side is going to use.

If we hadn't had our abortive experience in this pretrial, we would have gone into this in more detail than we did. I don't think there is any doubt in anybody's mind as to what I wanted done in this case.

Mr. Strachan: Your Honor, while we are dis-

cussing the general program, I want to mention this. It has been bothering me. At odd times I have gone over the great bulk of correspondence that has been selected from various files of the plaintiff trying to decide what I want and what I don't want. I have, I don't know whether it is 40 or 60 documents from [2551] their files that I may or may not use, and I haven't decided yet.

The Court: Is there anything that would keep you, Mr. Strachan, for your clients and your firm apparently have unlimited means, from putting a stenographer on those documents and for the plaintiff to have copies of them, list them or turn them over to the plaintiff and say from these 60 documents I may use 40?

Mr. Strachan: That is what I was going to say. I have quite a group. If Mr. Dixon wants them now before I decide which I may use and which I may not, I will give him those.

The Court: I don't see much of a problem in 40 out of 60, but I do see a problem if you shove them at the plaintiff and say, "Here is a lot of documents we are going to use a few of."

By this stage of the lawsuit, long before the trial, and certainly by this stage of the lawsuit, you ought to know almost definitely what you are going to use and what you are not going to use.

Mr. Strachan: Your Honor, I am not trying to solicit any sympathy for my personal problem, but I was brought into this case under extremely adverse circumstances.

The Court: I know, and you have done very well

under the circumstances. You are going ahead as though you had lived with it to start with, which I know you didn't, but that [2552] is not the point. What I am trying to point out is the difference between saying to the plaintiff, "Here, I have got three or four documents. I don't know whether I am going to use them or not."

Three or four doesn't present a problem, but if you say to the plaintiff, "Here is a flock of documents. I may or may not use them," I don't think that is fair.

Mr. Strachan: As far as the documents that were delivered to his office last night, I am perfectly certain the way things developed this morning that we will in all likelihood not reach those before Monday or Tuesday, rather. That certainly would give ample time to analyze them. More time than I have had.

I do want to say this. Because of the necessity of keeping up with this trial, I haven't been able to do any planning in advance. I have had to do this on a day by day basis. For that reason the exhibits weren't prepared in advance, because I couldn't clear them. I had to take first things first. It has been a difficult thing.

I am sorry the result has irritated your Honor.

The Court: It has irritated me and it also concerns me very much in connection with the trial of this suit.

Mr. Strachan: I assure you I have done the best I could and I will continue to do so.

The Court: I realize we have had difficulty, and

if you [2553] tried to conjure up a series of circumstances such as happened in this lawsuit, you couldn't come up with any combination that actually did happen, with Hurd going to try the case, getting in an accident, then he gets out here and has to go back and ends up in the hospital. You are admitted, but it isn't proposed you will be used. Williams can't be used because of an order I made, then I backed up and let him be used. The question is how much you want to use him. You couldn't have mathematically come up with a combination of what actually did happen.

Mr. Strachan: Whether it is possible mathematically or not, I hope it never happens to you or to me again, your Honor.

The Court: I hope so, too. [2554]

* * *

Mr. Strachan: May it please the court, we have had prepared for your Honor a memorandum with regard to the exhibits, Defendants' Exhibits BA through BT, and have furnished opposing counsel with it and we have discussed those exhibits seriatim to determine which ones counsel has objection to.

We are ready to discuss them with your Honor.

The Court: I went through the record to see where we were, and having in mind particularly Mr. Strachan's statement that I had permitted documents to go to the jury without them being in evidence, and having in mind also some determination of where we are at this stage of the case.

I will start with page 1804 of the record, which concerned Exhibit 60, 60 being a financial statement of the company for six months ending July 31, 1949. On page 1804 the clerk marked 14 copies. It was marked for identification.

"The Court: These are only marked now for identification. Do you want the exhibit identified before the copies are handed to the jury, or may they be handed to them and the questioning go ahead? It will save some time the latter way.

"Mr. Strachan: Yes. I have no [2556] objection."

Let's bear in mind that these were financial statements of the company which the defendants had access to——

Mr. Stark: Your Honor, on Exhibit 60 and Exhibit 62 we had not seen them until the day they were produced at the trial, those two financial statements.

The Court: July 1st, '49?

Mr. Stark: Yes.

The Court: Why had you not had access to them if you had been inspecting this company's records?

Mr. Stark: I might state in that regard, your Honor, because I would like to clarify the record on them, that we had not received all of the records, as you will recall, until the November 30, 1955, argument on the continuance, and past that, after the dismissal of Exchange Lemon. On Wednesday, December 12, 1955, at the close of our pretrial discussion I pointed out at page 65 of the transcript that notwithstanding Mr. Dixon's representation at

the prior hearing that we could have the books behind 1949, that we had not been given access to those books, and Mr. Walker stated the reasons why he felt we should not have them, and at that time, after the trial was commenced, we were finally given access, not as your Honor says by having particular books, but by getting a room full of books while the trial was in progress.

These particular statements, however, so far as we know, were not in those books. Our auditors had never had occasion [2557] to see Exhibit 60 or Exhibit 62 until they were introduced in evidence.

The Court: 60 and 62 were the two six-month statements?

Mr. Stark: That is correct.

The Court: But you had had, prior to that, the yearly statements?

Mr. Stark: We had had the annual statements, we had gotten them either immediately preceding or during the early stages of the trial.

The Court: At least a month ago? The trial started December 12th, and would you say at least by——

Mr. Stark: We hadn't gotten them on the 7th. We probably got them some place probably a month ago.

Of course we had the problem that we were in the course of trial at that time. But I think the record should be clear that these were not documents, as your Honor indicated this morning, which had been available to the defendants for three or four years. [2558]

The Court: Well, now, these two you are talking about?

Mr. Stark: That's right.

The Court: According to the explanation, apparently they had not——

Mr. Stark: Or any of the other documents prior to 1949 had not been available for any length of time prior to trial.

The Court: The plaintiff didn't offer documents prior to 1949. Those are the ones offered by the defendant. The plaintiff started with 60, July 31, 1949.

Mr. Stark: Yes.

The Court: Those two 6-month statements.

Mr. Stark: As I understand it, we did not have those.

The Court: What were you going to say, Mr. Dixon?

Mr. Dixon: At this point, your Honor, I think I should make clear for the record that on October 18, 1955, I wrote Mr. Hurd in full concerning the availability of records that they had requested specifically, and also in full concerning the theory of damages and the records and the type of evidence which the plaintiff expected to rely on to support its theory of damages. If your Honor wishes, I will be glad to either read this letter into the record or to have a copy made and attached to it. I think it should be in.

The Court: How long a letter is it?

Mr. Dixon: Here is the date of the letter. So many references have been made here to the fact

that some of these [2559] things were seen for the first time by counsel that I think that that part of it, as far as availability is concerned, should be made clear.

Mr. Stark: I simply want to point out not that Mr. Dixon had not offered the material, but that the material itself had not been made available.

The Court: Material as to 60 and 62?

Mr. Stark: 60 and 62 or any of the material prior to 1949, the great bulk of the material, but so far as this present discussion——

The Court: We are not talking about 60 and 62.

Mr. Stark: 60 and 62.

Mr. Dixon: I should say in reply to that I understood that when the request was made by Mr. Hurd that they wanted it, I informed the trustee to give them full access to the balance sheets and records and I assumed that they had already had them.

The Court: I know the problem. If it was a going concern, it would be different. But it was not a going concern and both sides had problems. I don't think we will dispute that.

The letter of October 18, 1955, was sent to Mr. Hurd. I have seen it before as part of pretrial proceedings and I am sure counsel have the original. Subject to any correction, at this stage, Mr. Reporter, you will incorporate that letter [2560] into the record?

(The letter referred to is in words and figures as follows:)

"Mr. Ferris E. Hurd,
"120 South La Salle Street,
"Chicago 3, Illinois.

"Re: Winckler & Smith Citrus Products v. Calif. Fruit Growers Exchange, et al.

"Dear Ferris:

"This will acknowledge and thank you for the enclosures contained in your letter of October 14. I presume you have already received a reply from the Trustee concerning your recent inquiry as to when your accountant would be able to examine the records of Winckler and Smith that were referred to in your letter. We have been somewhat handicapped in this entire matter due to the illness of the person on whom the Trustee must rely to secure the requested records.

"I am in the process of preparing and should be able to file in the near future our trial brief which will doubtless cover the damage questions referred to in your letter of October 14. I thought at one time that we might be able to limit the damage items as suggested in my letter of June 23. I have, however, found it extremely difficult to get together all of the information I desired before I could make a final decision on this point. Since we are approaching the time of trial, it is not fair to you to further delay an answer to your [2561] request. I find it necessary, therefore, to indicate that we will rely on the following claimed items of damage:

"(1) The loss of profits during the year, 1951, from the inability of the plaintiff to process single-

strength juice and to sell it in competition with other single-strength juice processed and sold by Sunkist and other California processors of single-strength juice. The measure of damages would be based upon the assumption that the plaintiff would have been able to have utilized its full processing capacities for such juice during the 1951 season. Evidence on the loss of profits would be not only based on the previous profit record of the plaintiff on these items, but would also be determined by evidence as to the operating profits of competitors, TreeSweet and Silzle, on this item during the 1951 season.

"(2) We also expect to claim and show as damages the loss of plaintiff's plant, including its forced sale, loss of good will and prospective future profits had it not been forced to take action under Sec. 10 of the Bankruptcy Act as a result of the alleged violations of the antitrust laws.

"We shall, of course, expect to use the [2562] operating statements of the plaintiff from the date of its incorporation to the date of the filing of the lawsuit as a basis for the loss of profits claimed, together with the plant and good will values of the company, as stated in the operating statements and balance sheets of plaintiff for the aforesaid period. We also expect we may make use of the statement of the plaintiff which was filed with the Division of Corporations of California at the time it applied for permission to secure additional capital for expansion purposes. By this I mean, of course, that the statements contained therein with reference to

the business of the company would be supported by the accounting records of the company. In other words, we shall naturally expect to support the accounting practices and procedures of the plaintiff in connection with its operating statements and balance sheets for the period commencing with its incorporation to the filing of the lawsuit.

"I expect the books and records of the company on these elements of damage, together with the testimony of accountants and officers of the company, will be given in support of these claimed items of damage.

"In addition to the foregoing, we will, of course, rely on damages sustained by the alleged discrimination between sales of oranges and single-strength juice to the plaintiff by EOP as against sales of such products to TreeSweet and Sikle under their respective contracts with EOP. This, of [2563] course, refers to the items of damage claimed by reason of the alleged violations of the Clayton and Robinson-Patman Acts.

"The damages claimed under the State act would, of course, in substance be the same as those claimed for the violation of the Sherman, Clayton, and Robinson-Patman Acts. Plaintiff, of course, will contend that the damages suffered stem from and are a direct and proximate result of the alleged conspiracy in violation of Sections 1 and 2 of the Sherman Act involving the defendants, Sunkist, EOP, and ELP, and the damages flowing from the alleged violation of Section 2 of the Sherman Act by defendants Sunkist and EOP, with reference to the

alleged attempt to monopolize and maintain monopoly control over that part of the trade and commerce in citrus juices represented by such citrus juice products as are processed in the State of California, including single-strength Valencia orange juice in particular, and thereafter sold in intra and interstate commerce.

"I have made some very minor corrections in the Stipulation of Facts, none of which, I am sure, you will object to. I am having it placed in final form and will, of course, submit it to Fisher and Stark for signature. The only changes which I made relate to paragraph one in which I have added the words 'by virtue of the provisions of paragraph 10 of the Bankruptcy Act' to the end of that paragraph. I have stricken the words 'except for Case-Swayne' [2564] in item 9 since Exhibit E of the answer to plaintiff's Interrogatories (No. 23) shows that Case-Swayne purchased 545 tons of oranges in 1951.

"I inserted the words 'greater part of the' after the first word of paragraph 12 and struck the words 'the greater part of which' from the third line of that paragraph which, I believe, is more in line with our intention. I mean our mutual understanding of this paragraph.

"The Trustee informs me that the processing plant of ELP at Covina was destroyed by fire during the latter part of 1951. I have, therefore, corrected the tenses of this paragraph to indicate that ELP *had* rather than *has* a processing plant at Covina in 1951 which *could* rather than *can* process

300 tons of citrus fruit per day and indicates that it *did* not, rather than *does* not, process single-strength juice, adding the words after '(Ex. A, Int. 10)' 'It was destroyed by fire in the Fall of 1951.' I am sure you will have no objection to these changes.

"I have further inserted the particular exhibits as they are described in the answers of Sunkist and EOP to the various interrogatories so that the particular exhibits will be more clearly identified as they are now known to all parties under the answers to the Interrogatories filed by the various defendants in the case.

"The subpoenas duces tecum, which I am preparing and [2565] hope to file in the immediate future, will call for some of the documents which are contained in some of the answers to the Interrogatories. I am, of course, providing in the subpoena that photostats of any records or documents called for will be accepted in lieu of the originals so that it will not be necessary for any of the companies to bring in their original records if they do not care to do so. I am calling for the Minutes which you were kind enough to forward to me in your letter and the excerpts contained in your letter will, of course, be satisfactory as a proper return to the subpoena.

"With kindest personal regards,

"Sincerely yours,

"WILLIAM C. DIXON.

"WCD:ehc."

Mr. Stark: May we then, in that regard, incorporate our letter of June 16? There are two letters. I don't have the dates. One is June 16 and the other is, I believe, September 16, relating to this same subject matter. We will have them here tomorrow.

The Court: We will look at them at that time.

Thank you, Mr. Stark, for calling my attention to the situation as to 60 and 62, the two six-months statements.

However, I think it will be conceded by counsel for [2566] defendants that once identified as financial statements of the plaintiff, they were admissible in evidence. We won't argue about that.

Mr. Strachan: Well, if proper foundation has been laid, I think that is true, and I did not call for the laying of the foundation.

The Court: As a matter of fact, as to 60, Mr. Dixon then laid a foundation on 1805.

As to 61, which was the first yearly statement and is not subject to the explanation just given by Mr. Stark, I have probably no other comment except it was then exhibited to the jury prior to its admission, a foundation being subsequently laid. It was a record of the company and there could have been no dispute about that, and Mr. Strachan's statement as to 60, I would suppose, would continue to apply as to the succeeding documents since I had raised the question with him at the very time 60 was offered, as I heretofore read from 1804.

As to 62, 63 and 64, 62 appears on 1821, 63 at 1826 and 27, and 64 at 1842.

To save time, I laid a foundation by questions

to the witness, and I think the record will show that each were exhibited to the jury prior to their admission into the record.

62 we have already mentioned is a six-months statement. [2567]

63 was a yearly statement.

64 was another six-months statement.

65 appears at 1857, and again I laid a foundation and again I think the record shows at 1857, the record shows that they went to the jury before they were received in evidence.

Now, that concluded the financial statements of the company except that in between certain notes, 63-A, 64-A, and so forth, were identified, although I don't think they were received in evidence at that time.

As to these financial statements, I think they were clearly admissible and, in fact, there was and could have been little dispute about them. [2568]

As to the yearly statements, the defendants had them for a long time prior to trial. As to the six-month statements, 60 and 62, probably the same thing would apply to 64——

Mr. Stark: We had 64.

The Court: 60 and 62, which were six-month statements, further reflected in the yearly statements, at least counsel, by Mr. Stark's admission, had them late in December, approximately a month ago.

Mr. Stark: I don't want to prolong this point, your Honor, but so the record will be clear, it is

my understanding that we never had 60 or 62 until they were produced on the stand.

We don't know where they came from, but our auditors never had those.

The Court: You can't say whether or not they were in the material that was moved over to the room near Mr. Fisher's office? At least all you can say is——

Mr. Stark: All we can say is that we had never seen them.

The Court: Now we come to 66, which was the Silzle matter, and the record there is at 1864. It was marked for identification. The court said:

"This is a different kind of exhibit?

"Mr. Dixon: Yes, it is, your Honor.

"The Court: Is this made up entirely now from [2569] records in evidence now in the case?"

The question wasn't asked of any witness, but it was asked of counsel.

Mr. Dixon said: "Now contained in the record in this case, your Honor.

"The Court: Some place or other?

"Mr. Dixon Some place or other, with the exception of the actual computation.

"The Court: And you propose to identify through the witness where the witness has secured the various figures, and so forth?

"Mr. Dixon: Yes, your Honor."

Then I told the jury it was to be used for a limited purpose, and it was passed to the jury, with no objection on anyone's part.

Mr. Strachan: And without having been previously submitted to us.

Mr. Dixon: If the court please——

The Court: I am not so sure about that.

Mr. Dixon: I think that isn't correct, your Honor.

All of these exhibits were submitted, to the best of my recollection, on the Monday preceding the Tuesday on which it was even contemplated any use was to be made of them, pursuant to the order of your Honor.

The Court: Be that as it may, the complaint talked about [2570] the contracts that the defendants entered into, and the amended complaint specifically talked about the Silzle and TreeSweet contracts, and how there could have been any surprise in knowing that the plaintiff was going to argue about some computations under those contracts is entirely new to me.

As to 67, at page 1884 the TreeSweet contract was passed out without objection, and the witness was asked whether he had done the same thing with those as he had done with 66.

This, again, was a compilation of evidence already in the record for illustrative purposes only.

Now we come to 69——

Mr. Strachan: Was that 67 your Honor was speaking about?

The Court: 67.

Mr. Strachan: I think there, again, it was one that we saw the day that it was marked.

Mr. Dixon: I would like the record to be clear

on that. It is my distinct recollection, and Mr. Irwin informs me to the same effect, that this document Exhibit 67 was also made available to the defendants, along with the previous exhibits already referred to by the court on the Monday—by Monday noon, when in accordance with what the record will show we indicated we would prepare them and make them available at least a day in advance of their use, and we set that as the [2571] date.

Mr. Fisher: Mr. Dixon, perhaps we are together on this.

Are these the matters which you delivered to my office, Mr. Irwin, on a Monday?

Mr. Irwin: I am not clear in my mind, but I believe it is.

We had two different matters under consideration at different times.

Mr. Fisher: I am not clear either.

There was one occasion when Mr. Irwin got some exhibits to my office on a Monday, and court was the next day.

Mr. Irwin: Mr. Fisher's recollection probably coincides with my own. I telephoned Mr. Fisher that we had promised to have them ready and available by noon Monday, and after discussion as to who would do the delivering, I carried them over to your office personally and delivered them to your secretary by 1:00 o'clock noon, before they were used in court on Tuesday.

Mr. Fisher: That is right.

The Court: At any rate, the record shows no sur-

prise on the part of the defendants by able counsel at the counsel table. No one raised any objection. The court can only draw the inference that the defendants knew and had known for a long time that the Silzle and TreeSweet contracts were the gist of this case, and that complaint would be made by the plaintiff of it, and that reliance would be placed [2572] upon what the record showed as to the figures resulting from the Silzle and TreeSweet contracts.

Exhibit 68 we pass up, because it was the appraisal marked for identification.

We come to 69. 69, to refresh your recollection, is a computation made by Hodge to show what he claimed would have resulted from the additional 12,000 tons. The document was not marked until Friday at 10:00 a.m., at page 2166, but the record concerning that starts at about 1888 of the record when Mr. Dixon started to ask Mr. Hodge his hypothetical question.

This was the thing that led up eventually to 69. And the question was asked—it may have been asked earlier than page 1888, because I sustained one objection and it was rephrased, and so forth. The question was repeated on page 1892, which probably became the final question, and there the question wound up with these words:

"——taking all of those things into consideration, do you have an opinion as to whether Winckler & Smith would have processed or operated through processing the 12,000 tons of Valencia oranges on the same basis at a profit during the year 1951?"

It seems to me the question meant with the 12,000 tons would the corporation have operated at a profit. However, it was clarified at page 1893:

"The Court: But the particular question didn't tie [2573] the 12,000 tons to any supplier. I am still worried about the last part of the question, whether you said processing those 12,000 tons at a profit, whether Winckler & Smith would process those at a profit, or whether the question was whether Winckler & Smith on the basis of their books and records after processing the 12,000 tons, would have made a profit instead of a loss." [2574]

Now, I can only conclude where defense counsel are ordering ten copies of a transcript, and when I see it indexed as it is here now, that the transcript is being read.

Mr. Strachan: May I just inject something there, your Honor?

The Court: Yes.

Mr. Strachan: That is what the transcript of the witness' testimony said at the time he made the computation orally, which I think was before Exhibit 69 was introduced.

The Court: All right.

Mr. Strachan: Then when 69 was introduced and shown to me at the same time it was shown to to jury——

The Court: It had that misleading statement.

Mr. Strachan: At the bottom it said Winckler & Smith Estimated Profit Processing 12.000 Tons of Valencia Product Oranges $25,000. I thought

surely the witness had made a mistake when he added that to the actual loss as shown by the income account, because I thought that instead of adding it to 184,000, he should have subtracted the 25,000 from 184,000. I couldn't get through my head for days why that wasn't true.

The Court: All right.

Mr. Strachan: It may be a mental infirmity, but that is the fact.

The Court: At 1895, Hodge starts to tell how he [2574-A] arrived at this computation and gives his figures, 1895, 1896 and 1897, and at 1908 there is found testimony about the figures.

Then we come to cross-examination of Mr. Hodge, which began at 10:00 o'clock, January 11, and it proceeded all day Wednesday, January 11, and on Thursday, January 12, the cross-examination proceeded on the question of these computations. In fact, the cross-examination starts about 2057—2059. I guess it is, on this subject. It went all day on this subject matter, all day Thursday. It went until the time we quit on Friday with some minor interruptions on this one subject matter, the computation, a day and a half, which explains something further along the line.

At 2105 the court said:

"I don't know that he gave a profit on 12,000 tons. He gave a profit of what would have happened if they would have had 12,000 tons added to what they already had, and the figure was—are you talking about the $25,000 figure?"

At 2108, Mr. Strachan asked a question:

"Mr. Hodge, could you make a computation showing the gross sales from the 12,000 tons of fruit of $750,000, which you testified to,"——

Well, I will read the whole question.

"——which you testified to, show the cost of [2575] those particular sales, show the gross profit on the sales, deduct the selling expense on those sales, and the brokerage, deducting also general administrative expense, and show the net profit—profit or loss—on the processing of that 12,000 tons at that selling price, and also show us a reconciliation between that sort of an income account and your conclusion that with the 12,000 additional tons of fruit available Winckler & Smith would have converted $184,000 loss for the year ended 1952 into a net profit of $25,000, can that be done?"

Page 2130, the witness is then asked to make certain computations and states—well, the question is by Mr. Strachan:

"Well, now, will you just go through this computation with me and then if you think there is an explanation for any difference that occurs, I would like to have you tell me what it is?

"A. I would be very happy, sir. Could I have a copy of your computation?"

And so forth.

2142. 69 for identification has never yet been even marked. It is not even in existence on Thursday. It comes into court for the first time Friday morning. At 2142: [2576]

"Mr. Strachan: Mr. Hodge, in your direct examination you testified that with this 12,000 tons of

Valencia oranges processed under the terms of the TreeSweet arrangement, Winckler & Smith would have enjoyed a net profit for the year ended January 31, 1952, of $25,231.45?"

The witness says yes.

"Q. That profit, as I understand your testimony, would be after offsetting the actual loss for that year of $184,523.20?"

Now, we have spent the whole day on the matter. At 2147 there was a question asked of the witness and the court said:

"Figure it out and then we are going to stop this.

"The Witness: Approximately $3.40 a case, sir.

"Mr. Strachan: That's all of the cross-examination."

If there is some doubt about what I meant by stop, I meant we were stopping the cross-examination, but Mr. Strachan said "That's all," and the court said:

"We are going to stop this because if you are going to rely on this type of account, I want a written statement prepared on it so it can be analyzed. I am not much of an accountant, but I [2577] think somebody is treating you wrong in their computation.

* * *

"If you rely on it, I want a written computation prepared"——

Well, go back to my first statement.

"Mr. Strachan: We expect our witnesses will put in a computation.

"The Court: If you rely on it, I want a written

computation prepared, and it can be handed to them for study like theirs was handed to you.

"Mr. Strachan: Of course, the plaintiff's computation was not reduced to written form. However, we propose to have a written computation that can be examined.

"The Court: Well, that is true. This other computation was made orally, but I think you should have a written computation on these matters."

I think that illustrates that the court insisted that a computation be made and that one be made by both sides if this was going to be in issue.

2150, further on the same matter:

"Mr. Strachan: I wonder if in that connection it might not be well to prepare a statement of the computation that I just went through orally. [2578]

"The Court: Yes, you may do that. I think it would be helpful."

Then we come to Friday morning, 2166. There is then marked for identification 69.

"The Court: Do you want to pass it to the jury?

"Mr. Dixon: May it be distributed to the jury?

"The Court: Pass it to the jury."

This was a reducing to writing of a computation which the witness had made orally, based on the record already made, and apparently was done at the court's request and with the concurrence of counsel for both sides and with permission granted to the defendants to make a similar computation, as a result of which AZ was prepared in behalf

of the defendants, and it likewise was a computation based upon what was in the record.

The clerk marks the exhibit at page 2185.

"The Clerk: Shall I distribute them to the jury, your Honor?

"The Court: Yes."

The jury were likewise told that this was another illustrative exhibit.

The matter comes to an end at 2204 and 2205, where Mr. Strachan states several matters which made me think that he had got himself straightened out by that time and he was [2579] then excused for the rest of the afternoon.

On summary, you had a series of financial reports of the company with foundation laid. On the original one, 60, the question was raised as to whether there was any objection to passing it to the jury before it went into evidence, and no objection indicated, and the rest treated the same way.

You had 66 and 67, computations based upon matters in the record, namely, contracts particularly relied upon by the plaintiff, which the defendants knew of such reliance, certainly, from the time the amended complaint was filed, and particularly as to TreeSweet, certainly earlier, and from the time the complaint itself was filed.

69 again is based on matters in the record and requested by the court after a day's cross-examination on one series of computations and after the court had indicated it heard all the cross-examination on that it was going to permit.

Now, that is where we are up to date. Now we

come to another series of exhibits. I am not going to permit the witness to illustrate each and every bit of his testimony by an exhibit. If that were to happen, we might as well have the testimony typed up and hand it to the jury to take to the jury room. That is about what the thing amounts to. [2580]

Certain of these exhibits would seem to me to be proper. I am talking now about the general list from BA down to BX.

Some of them would clearly appear to me to be improper.

Others, it would seem to me, should be rejected on one ground, and some on another.

Certainly the defendant may substitute for AZ, which is not in evidence, or use along with AZ a computation that was the result of this long cross-examination, as to what they contend by it.

That refers to BS and BT.

I don't think you can put in two of them. You have got two that look towards the same result. It would seem to me that an exhibit along that line would be proper.

Mr. Strachan.

Mr. Strachan: I should like to have your Honor allow me to lay a foundation for that and explain the manner of preparation.

I want to say as to AZ, I think it shows on its face that it was prepared at the time that I and those working with me were under a misapprehension as to how Mr. Hodge had gone about his computation. For that reason I didn't follow it up and I don't intend to offer it.

The Court: You have no problem. It is not in evidence and it can be ignored, but I am merely for our discussion tying it in with BS and BT. They all relate to the same [2581] matter.

Mr. Strachan: They relate in their entirety to what 69 covers in one exhibit. In BS we have dealt with the processing of the 12,000 tons as 12,000 tons added to the production which actually occurred during that year. Applied the costs as they have been developed from the books of account for the year '51. And that shows that the loss attributable to the added 12,000 tons would have been $52,000.

Now, BT is a consolidation of the showing on BS, where you take item by item the actual results from Exhibit 65, which is the profit and loss statement for the year, and in parallel columns show how this hypothetical 12,000 tons would have affected each of those items, by adding across, and show the combined effect, and at the end result show a loss to be the combination of the 184,000 of actual loss, plus 52,000 of added loss due to the processing of the added tonnage.

The Court: How does it become material in this kind of a computation what Sunkist would have made out of the oil?

You have got your whole exhibit built around, in part, a proposition that Sunkist would have got more oil from TreeSweet than they got from Winckler & Smith. The computation that was under discussion, and which the court permitted 69 to be filed, and for which the court also permited you to

make a computation, concerned what Winckler & Smith would have made out of 12,000 tons. As I read BS, and I take it the [2582] defect would also apply to BT, you have computations in here as to the difference that Sunkist would have received from Winckler & Smith work and from TreeSweet work.

Mr. Strachan: Your Honor, that is based on the same thinking, I believe, that was behind your Honor's requirement that Mr. Hodge combine, in the analysis of the Silzle and in the analysis of the TreeSweet contracts, the return from the oil and return from the juice.

It is basic in our development here that if Winckler & Smith were to operate under the terms of the TreeSweet contract it should return for the fruit that it received as much, in value, as TreeSweet returned. That we shouldn't allow them to have a windfall of the value of the oil; the difference between the value of the oil that they would return, and the value which TreeSweet would return.

The Court: You have a right to bring that out. You have brought it out on cross-examination as to Exhibits 66 and 67, and if you are not satisfied with the computations there made you can have your accountant make other computations. But let's not confuse the situation with an exhibit which you propose to offer pursuant to the discussion we have had—we have been over the record—which concerns the computations made by this accountant of what Winckler & Smith would have made. Let's not

confuse it with an exhibit which comes in, and then show what Sunkist would have made if it had got a [2583] certain amount of oil out of the TreeSweet production.

Mr. Strachan: We are looking at it from the other side.

The Court: Separate the two sides, then.

Mr. Strachan: The basis on which Mr. Hodge made his computation was an assumption that Winckler & Smith could have had the gains but not the costs involved in obtaining and processing fruit under the TreeSweet contract. Now, part of the cost of that fruit to TreeSweet was returning ten dollars and some cents worth of oil per ton, and that should, likewise, be charged up as one of the costs of the fruit. If it was delivered to Winckler & Smith, they shouldn't get a cheaper price on the same fruit than TreeSweet did.

That is the basis of both of those computations.

The Court: You may be right on that. I am only thinking about that. If I decide you are right, then my criticism on that point would be obviated.

It seemed to me what you were doing with one exhibit was working it as an exhibit that involved 66 and 67 and also 69. But from what you just stated, upon reflection, it may be that that would be proper.

Mr. Strachan: Let me say this, your Honor, about the planning of this branch of our presentation. I didn't have an exhibit as such relating to 69, because I expected that the witness would identify particular items, and which he would testify that

he did adjustments, such as the cost of [2584] cans, cartons, and cost of labels, and tell us what the adjustment should be in those items. That is the way we were going to deal directly with 69 and its express and implied assumptions. But this other was our own computation of what the cost of the whole fruit should be to a processor if he expected to have the gains and also take the losses or costs that went with the processing of the fruit under the TreeSweet contract.

The Court: I will look those two over further. But there is still a question, also, as to whether you should put in two of them or only one exhibit.

Mr. Strachan: I don't care to encumber the record, and if it would seem that one could be made to serve the purpose of two, I wouldn't want to put in an exhibit just for the sake of there being another exhibit.

Mr. Dixon: I am not sure whether your Honor wants to hear from us on this proposed Exhibit BS at this time or not.

The Court: Let me hear from you briefly.

Mr. Dixon: Our position is that we certainly would oppose the use of this exhibit with reference to that part which relates to the oil, because while that possibly might be part of the return to Sunkist, it had nothing to do whatever with the profit which TreeSweet made by reason of having fruit made available to it, which is the basis for this [2585] contract.

Mr. Strachan: I don't agree with that. Because it seems to me the more efficient processing of the

oranges, in order to get the higher yield, would be reflected in TreeSweet's costs, and therefore if Winckler & Smith had a less efficient, more costly way of dealing with the fruit, and consequently were able to return less value in oil, that it shouldn't be allowed the same processing cost that TreeSweet has for its more efficient treatment of the fruit.

The Court: There are two things being mixed up here. One is a purported defense attack on whether Sunkist would have given Winckler & Smith a contract. That may well involve the question of whether Winckler & Smith could have profitably returned as much to Sunkist as did TreeSweet for oil.

The other question is the question to which 69 was directed, and to which the reply compilation should be directed, and that is what would Winckler & Smith have made, not what Sunkist would have made, had Winckler & Smith had the additional tonnage.

Also, I think the record is clear that 69 was based upon the computations made by the witness which were then in the record, and that the permission to file the counter-computation was also granted on the basis of what was in the record.

It was merely summarizing the computations that you had had the witness make orally. [2586]

Mr. Strachan: That was AZ, or whatever it was. Are you referring to AZ?

The Court: Whatever exhibit you are going to use, it would be one based upon that record.

Mr. Strachan: BS and BT will be based upon the

testimony of our witnesses, which testimony is not yet in the record. It goes further than mere rebuttal.

The Court: Then to the extent that it goes further, if that foundation is laid, I am going to sustain an objection to it upon the ground that it is merely to illustrate by exhibit form the testimony of the witness, and does not have any relationship to the situation that appears in the record.

Mr. Strachan: The facts that are reflected there will appear in the record when our witness is through testifying, I am sure; just as 69 was predicated on Hodge's testimony, so BS and BT will be predicated on evidence yet to come.

The Court: I propose to sustain an objection to BI, withdrawal by Winckler, what Winckler got.

I don't think it has any bearing on the issues of this case. The assets and liabilities of the company reflect what they had left. I don't think it is material whether he was paid $100,000 or $1 a year. I think it is outside the issues. It is an artificial issue in the case.

Mr. Strachan: As to that, your Honor, I think it has a very direct bearing upon whether this business was properly [2587] managed or improperly managed, to show whether the manager, within an unbroken series of loss years, was warranted in taking, personally, out of the business, when the corporation was in terrible financial condition and was still losing money, the very substantial amounts of money that Mr. Winckler took.

I would like to lay a foundation for the offer, in any event.

The Court: BJ I think is clearly bad. If I read it, as I think a juror would read it, the inference there is that the prospectus was issued fraudulently, which is not an issue in this case.

Mr. Strachan: The prospectus has been admitted in evidence, and on its face it would show something over one-half million of net earnings by the business during its whole life, and it does that by overlooking certain facts.

For example, instead of taking the whole business life, it would take a period of 11 months and say there was a profit in that 11 months, although when you get to the twelfth month you find out that at the year end operations there may have been a loss. And it is by ignoring the particular losses that they come up with that figure, and I think we are entitled to analyze the manner in which this prospectus shows the net earnings of over a half million dollars, because on the face of the prospectus that is what [2588] it is, and it is not arrived at by any correct methods.

I want to offer evidence on that subject, and Exhibit BY as illustrating the testimony. [2589]

Well, I am going to permit you to use exhibits in connection with the matters I allowed plaintiff to use exhibits on. I am going to permit you to use exhibits on a summary of what you think about Silzle and TreeSweet contracts, which the plaintiff did. You will be entitled to use an exhibit in connection with the Exhibit 69, the computation.

I am not going to permit you to use exhibits to illustrate every bit of the testimony of the witness as he goes along. Otherwise, as I said before, we might as well give the jury a typewritten copy of the witness' testimony to take to the jury room.

I think that you would be entitled to make a reconstruction of the financial statement for the year 1951 upon proper foundation. You have got already in evidence BB, BC, BD and BE, BF and BG.

Mr. Strachan: BG will not be offered, your Honor.

The Clerk: BF isn't in evidence.

The Court: I know, but you have identified BF concerning surplus. What you have done, of course, is by five exhibits broken down each portion of the financial statement. That is sort of under the bridge now.

How are we going to proceed on this? I suppose we might as well proceed in the absence of the jury on some of these.

Mr. Strachan: I think procedurally that might be the most expeditious way to do it, your Honor. I think that will [2590] present the questions of procedure in the most pointed form and give me the opportunity to lay such foundation as I want to, and Mr. Dixon, on the other hand, an opportunity to be specific in his objections.

Mr. Dixon: May I discuss this for a moment, your Honor, because I think it is important, at least to the plaintiff, in point of time. We had to reread testimony, and so forth, and it probably

speeded it up to some extent. However, I don't think this situation is quite analogous.

The so-called exhibits which the defendant expects to offer that we have been discussing are in fact summaries, as I read them, of the testimony which the accountant witness will give. It is on that assumption that they are offered. It seems to me the question will be whether or not he could testify first to the statement, and if it is not objectionable, the evidence is in, and then if the summary is proper of the evidence, it could go in, if necessary. But that is not the situation we dealt with in the previous exhibits we have discussed of the plaintiff.

The Exhibit 39 the plaintiff had made up after the witness had fully testified concerning his opinion and conclusion and the basis for it. Then we put it in. In other words, there was already evidence in the record to support the showing of this to the jury.

Now, what counsel expects to do with this, and that is [2591] why I rose to object to the procedure that I was sure he wanted to follow this morning, is that before any testimony at all is in the record by the witness concerning any of these things in these exhibits, he wants the jury to have the exhibit, so, presumably, the jury can more easily follow the testimony. That is the only justification for it, as I see it.

Now, on that basis I object to it because the jury already has something in advance of the testimony in the record, and I don't think it is proper. It is

not a summary, in other words, of the opinion of the witness.

All of these exhibits deal, your Honor, with alleged facts which can be directly testified to by the witness on the stand. For example, some of the material in these exhibits, I have informed counsel, and I say again that I am agreeable to a stipulation of fact at any time that I am satisfied that any of these things that they are talking about are facts. I will so stipulate, subject to my reservation of objection as to materiality and irrelevancy of the fact.

But it seems to me that these exhibits that they want to offer are being offered for an entirely different purpose, not to explain testimony already in the record or the basis of an opinion of the witness, but to get in through the back door in advance of the actual testimony a lot of things that the jury might at least consider which might well be prejudicial [2592] to the case before any foundation at all has been laid for it.

The Court: That is why I went through the record up to date to see where we were, and in each instance to date there has been no exhibit given to the jury except where the material in that exhibit was already in the record.

Mr. Strachan: I can comply with that same requirement.

The Court: That then raises the question of whether we are going to have a flood of these exhibits. I am going to permit reasonable summaries. In the plaintiff's instance, they had a summary of

the TreeSweet and Silzle contracts, and we got into 69, which apparently the plaintiff never intended to offer as an exhibit, but which the court requested after long cross-examination and informed counsel that they could do the same thing and present a computation.

The plaintiff had financial statements in the record. The defendant is certainly entitled to have a financial statement showing from their standpoint the financial condition of the company certainly in the year 1951 and possibly in the other years. Presently you apparently have it all in except F on surplus, broken down into five different years.

But beyond that I don't propose to have everything the witness testifies to illustrated by an exhibit. The illustrative exhibits are within the discretion of the court. All the court has to do is be even handed, and that is what I [2593] propose to do. [2594]

* * *

Mr. Strachan: May it please the court, as I told you, I have two witnesses that I would like the privilege of putting on out of order, and for that purpose I would like to have Mr. Lynch temporarily excused from direct examination.

The Court: You may.

Mr. Strachan: Mr. Walker.

MARVIN H. WALKER

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Marvin H. Walker.

Direct Examination

By Mr. Strachan:

Q. Mr. Walker, where is your home?

A. Lake Wales, Florida. I am general manager of the Florida Citrus Canners Co-operative.

Q. You are in Los Angeles temporarily, is that correct?

A. For a meeting of a National Council of Farmer Co-operatives.

Q. Which has adjourned here today?

A. That's right.

Q. You appear here pursuant to subpoena served upon you by the defendants? [2595]

A. I do.

Q. Now, will you tell us when you had your first connection with the citrus fruit industry in Florida?

A. About 1923.

Q. What was that connection with the industry?

A. With a local association of citrus fruit growers, and in the same year with the Florida Citrus Exchange, which is a fresh fruit co-operative marketing organization.

Q. You say you are general manager of what organization?

(Testimony of Marvin H. Walker.)

A. Florida Citrus Canners Co-operative.

Q. Will you tell us briefly what that organization is?

A. It is a citrus processing association which handles the processed oranges, grapefruit, tangerines and limes of about 9 or 10 per cent of the growers of the State of Florida.

Q. How long have you been general manager of that co-operative?

A. Since the fall of 1950. I have been with the co-operative since 1949.

Q. Before that what was your position with the Florida Citrus Exchange?

A. I was assistant general manager of the Florida Citrus Exchange.

Q. Will you describe briefly the nature of that organization?

A. It is an organization that markets the fruit, fresh [2596] fruit, packed by local associations of growers. Most of my time, however, in the last—well, in the ten years before I went to Lake Wales, was with the Florida Citrus Commission.

Q. What is the Florida Citrus Commission?

A. The Florida Citrus Commission is a state government agency that administers our various citrus programs, our advertising program—we levy taxes on all of our fruit for advertising purposes, a research program, and we engage in transportation problems, and matters of that kind.

Q. As I understand it, the orange varieties and the packing seasons in Florida are somewhat dif-

(Testimony of Marvin H. Walker.)

ferent from those that we find in California. Will you describe briefly the varieties and the packing seasons of the Florida crops?

A. Florida oranges are harvested usually from about the first or middle of October to the end of June. Once in a while when we get some late bloom fruit, we will harvest fruit through July and into August.

We have quite a large number of varieties in Florida, but they are classed in three major groups. The early varieties harvested in October and November and December, the Hamlin oranges, the Parson Brown oranges, which are comparatively low in soluble solids, juice solids, and which have a juice rather pale in color.

The mid-season oranges, which are usually harvested in December, January and February, sometimes in March, and [2597] is a very good orange, but an orange with a lot of seed in it, pineapple orange, and what we call the seedling orange.

Then the late orange, which is almost entirely the Valencia type of orange, which is harvested from about March 1 until the end of the harvest season in late June or July.

Q. Are you able to recall the market conditions and the market prices as they trended over the years 1949, 1950 and '51, from your personal recollection?

A. Those were my first three years with the Florida Citrus Canners Co-operative and I have

(Testimony of Marvin H. Walker.)

quite a good recollection of some of the things that happened in that period, yes.

Q. Will you describe those crop conditions and the prevailing market conditions over that period of time to the jury as best you can recall them?

A. Well, in those days Florida had an orange crop of about 58 or 60 million boxes of oranges, and frozen orange concentrate was a new product, just getting started.

As a matter of fact, frozen orange concentrate was developed and even patented by the Florida Citrus Commission at the time when I was with it, and frozen orange concentrate is the product that has taken over and almost controls what happens in the Florida orange industry these days.

I think the first packs of frozen orange concentrates were back in 1945-46. Very small pack that year. Very small pack the next year. Those were the first few years following [2508] the war. We were all quite concerned about economic conditions in this country. We lost all this Army and government business for our products.

But then suddenly frozen orange concentrate found a market and captured the imagination of people, and it was in 1948-49, I think, that we, the industry, Florida industry, packed almost two million gallons of frozen orange concentrate and, contrary to the experience of the two preceding years, we didn't have enough of it. Everybody wanted it.

The Court: Let me interrupt. When you use the terms "48 and 49," you are speaking of the season?

(Testimony of Marvin H. Walker.)

The Witness: That is the season.

The Court: It started October, 1948, and went to June, 1949?

The Witness: That is correct.

The Court: All right. [2599]

Q. (By Mr. Strachan): Was it the '47-48 year or the '48-49 year——

A. '47-48 that we produced about 2,000,000 gallons.

The Court: '47-48?

The Witness: '47-48. Then in '48-49 the production jumped all the way to 10,000,000 gallons.

Mr. Dixon: Do you mean in frozen concentrate?

The Witness: Frozen orange concentrate.

And in '49-50 it jumped to 20,000,000 gallons, or it might have been twenty-one, in that neighborhood. It was going up at the rate of 10,000,000 gallons a year, a phenomenal increase in the production of a food product.

And in '50-51, as I remember the situation, it went to approximately 30,000,000 gallons. And it went even higher of course, in the followings years.

But it was in that period that we had this tremendous initial growth in the production and distribution of frozen orange concentrate.

Q. (By Mr. Strachan): Now, starting with the year 1949, what effect——

The Court: By 1949—he is using seasons, so adjust your questions, if you can, to seasons.

Q. (By Mr. Strachan): Taking the year '48-49, then, can you recall what was the effect on the

(Testimony of Marvin H. Walker.)

price of fruit and the price of citrus products, particularly with reference [2600] to orange juice, sweetened and unsweetened single strength?

Mr. Dixon: I object to the question, your Honor. It calls for a conclusion. What was the effect is a question that is entirely too general. I have no objection to a question asking for testimony as to the facts.

The Court: I think the witness is qualified as an expert on Florida problems, so the objection will be overruled.

We will be charitable to you.

The Witness: May I have the question repeated?

(Question read by the reporter.)

The Witness: The prices went to substantially higher levels in that period.

Q. (By Mr. Strachan): Can you recall approximately how high the price of orange juice went during that period? A. That is '47-48?

Q. No. '48-49.

A. May I refer to my own figures on that?

Mr. Dixon: Just a moment. I would like to know where the witness got the information, and so forth, your Honor.

The Court: Do you have some document that you want to refer to, Mr. Witness?

The Witness: This document is a report of our actual average selling prices of the Florida Citrus Canners Co-operative.

The Court: Who prepared the document? [2601]

(Testimony of Marvin H. Walker.)

The Witness: Our accounting department. Our treasurer would be the man responsible for it. Our average selling prices, by months, in these years——

The Court: Just a moment.

Do you want to inquire on voir dire?

Mr. Dixon: Yes.

Mr. Walker, when was this prepared, can you tell the jury?

The Witness: I beg your pardon?

Mr. Dixon: When was the paper, whatever it is you are referring to, prepared by the treasurer of your company?

The Witness: It was prepared——

Mr. Dixon: Before you came out here?

The Witness: Yes. At least six months ago.

Mr. Dixon: Specifically at your request six months ago?

The Witness: Yes.

Mr. Dixon: For the purpose of bringing it out here for this case?

The Witness: No. At the time I did not know that I was going to testify in the case.

Mr. Dixon: Do you make a habit of carrying those records with you?

The Witness: I had this one because I had a call about the thing and was asked if I would be prepared to say something about it. [2602]

Mr. Dixon: I am only questioning you at the moment with reference to this particular paper that you are referring to.

(Testimony of Marvin H. Walker.)

The Witness: This is the only one I had brought, by the way.

Mr. Dixon: That was prepared at your request six months ago?

The Witness: Yes.

Mr. Dixon: For what purpose, please?

The Witness: For a friend in the California Fruit Growers organization, or Sunkist Growers. He asked me at the time—he was in Florida, he phoned, I didn't even see him at the time, he phoned and asked me if we could let him have our selling prices in this period. And I just turned the request over to the accounting department and was furnished with a copy of what was prepared.

Mr. Dixon: This was prepared not for your own particular use, but for someone in Sunkist, and at their request?

The Witness: Yes.

Mr. Dixon: Who was the person making the request?

The Witness: Mr. Finley.

Mr. Dixon: All right. Go ahead.

Q. (By Mr. Strachan): Now, will you tell us how the prices ranged in the season '48-49?

A. They started out at comparatively low levels, about [2603] $1.75 per dozen 46-ounce cans. The 46-ounce can is this large can of orange juice. This is the price at Lake Wales. 12 cans to the case. At roughly $1.75. And by September, 1949, our average prices had gone over $4.50 per dozen.

(Testimony of Marvin H. Walker.)

Q. Is that an unprecedented price for such citrus products?

A. I think it is the all-time record high price. I recall no higher price.

Q. Following the setting of that record high price in 1949, will you tell us how the market trended thereafter?

A. Prices started to go down some during the season of 1949 and '50, and they dropped greatly in the season of 1950-51.

I might explain that when orange concentrate first got into extensive distribution in this country the consumers were paying about 29 cents for a six-ounce can. That is what you paid for it in places like New York and Chicago.

Prices kept going down steadily as we started packing 10,000,000 more each year, and there was, naturally, quite a change in the entire frozen orange concentrate business. We had to achieve a great many economies in our operations to reduce prices and to market the very rapidly increasing production.

Last year, for example, prices got down to 10 cents a can from the 29 cents a can that we were getting a comparatively [2604] few years ago.

I think that the average price of frozen orange concentrate today, just as a matter of information, would be about 15½ or 16 cents——

Mr. Dixon: If the court please, I have no objection to this witness telling what the situation is

(Testimony of Marvin H. Walker.)

today, but I think the testimony should be confined to the period in question and ending 1951, please.

The Witness: I beg your pardon.

The Court: Yes. Ask your question, Mr. Strachan.

Mr. Strachan: Yes.

Q. (By Mr. Strachan): Will you trace the price trends and the market conditions on the Florida orange juice, including the single strength, sweetened and unsweetened, through the year '49-50 and into the following year of '50-51?

A. The Florida packs of canned orange juice in this first season you mention of '48-49, and the second one of '49-50, were, as I recall, in the neighborhood of about eighteen or nineteen million cases a year. Then in this season of 1950-51 we all got a little too optimistic and packed close to 20,000,000 cases that year. It was at the end of that marketing season that we had a very drastic decline in the prices of all of our processed orange products, both concentrate and canned juices.

Q. Did the Government crop estimate have any bearing [2605] on the quantity of juice packed and the canners' expectations with regard to the market, during the first six or seven months of 1951?

Mr. Dixon: Objection to the form of the question, your Honor. Just for the record.

The Court: Overruled.

The Witness: I would say that the Government estimate didn't have any influence on the quantity packed, but it had a lot of influence on the ex-

(Testimony of Marvin H. Walker.)

pectation of the canners. In 1950-51—it is sometimes a little difficult to remember each of these seasons —we started out with a Government estimate, a production of 61,000,000 boxes of Florida oranges, 62,000,000 boxes was the first estimate; that estimate was actually reduced to about 61,000,000 boxes. If I correctly recall the figures, by July we had harvested 68,000,000 boxes, we harvested substantially more oranges that season than the Government forecast, and most processors, like ourselves, figure prices on the basis of these Government crop forecasts.

Another factor that year, and this has just come to me, is that it was at about that time that we were also increasing our yields of frozen orange concentrate, particularly, and to some extent canned orange juice from oranges. And by "yields" I mean how many cans we get out of a box.

Mr. Dixon: Is this in '51?

The Witness: This was back in '51. [2606]

There was a marked increase. I recall a report I made to our board of directors at the end of that disastrous season down there trying to justify some of the low prices we were returning to our growers. It was not only the great increase in the Government crop estimate by the end of the season, but also this increase that we achieved during the season in the yield of frozen orange concentrate. We had more boxes of oranges, the production was actually greater than indicated by the increased

(Testimony of Marvin H. Walker.)

number of boxes, we got a greater yield out of the boxes we had.

Q. (By Mr. Strachan): What was the effect of those circumstances, in combination with each other, upon the market price of orange juice, canned orange juice?

The Court: Are you talking about Florida juice?

Mr. Strachan: The Florida juice, yes, your Honor.

The Witness: The effect was disastrous.

Q. (By Mr. Strachan): Will you trace it from, say, the spring of 1951 into the summer months?

A. There is a lot of psychology in the citrus canning business. We had had two or three very profitable years, and prices were going up and up and up, and concentrated came along, and grove prices were going up, orchard prices, as you would call them in California, were spiraling, and suddenly we had this big increase in our crop production, the increase in our yields, we had raised our product prices— [2807] by "product prices" I mean the prices we were charging for a dozen six-ounce cans of concentrate, and a dozen cans of 46-ounce juice —to levels which naturally reduced the quantities the consumers were purchasing. Inventories built up. We were all frightened, when we wound up the 1950-51 season with a lot more oranges than anybody thought we had, and weather conditions were favorable, and the bloom for the next year's crop had appeared, and the new crop was showing

(Testimony of Marvin H. Walker.)

up on the trees, and we were all deeply concerned about a further large increase in the following year's crop to be marketed beginning in October, 1951, so most of the packers, and many of them with the urging of their bankers, decided to unload, and they just unloaded their juices and unloaded them fast.

Q. Now, can you, by recollection or by reference to the average prices that you have on your memorandum there, trace the effects of that unloading?

A. Well, in the year 1951, the monthly average sales prices of Florida Citrus Canners Co-operative for unsweetened orange juice, per case of 12/46 ounce cans, f.o.b. Lake Wales, were in January, $2.47; February, $2.63; March, $2.85; April, $3.01; May, $2.70; June, $2.41; July, $1.91; August, $1.73. That is when we unloaded, in August.

Our prices strengthened a little bit then on what we had left. [2608]

September $1.99, October, $2.04.

Mr. Strachan: I would like to have this document, if you don't mind, marked as an exhibit in the case.

The Court: What will be the next number unassigned, Mr. Clerk?

The Clerk: BY.

(The exhibit referred to was marked Defendants' Exhibit BY for identification.) [2609]

Mr. Dixon: The general objection heretofore made, your Honor, on the ground the witness has

(Testimony of Marvin H. Walker.)

already testified concerning anything in the document. I don't think it is necessary to further encumber the record.

The Court: Objection sustained.

Mr. Strachan: Had the document been received, I would like to furnish copies to the jury. The objection is sustained, I understand.

The Court: I will permit some reasonable use of exhibits commensurate with the plaintiff's illustrative exhibits, but I am not going to permit every witness who testifies to illustrate his testimony with a written exhibit. If I did, I might as well let the jury take the written transcript of the testimony of the witness to the jury room, and that I will not do.

Q. (By Mr. Strachan): Mr. Walker, will you state to the court and the jury what the relationship is between the pricing of Florida orange juice and the pricing of California orange juice, or vice versa, and give us the reasons for whatever effect or lack of effect you describe?

A. Florida establishes the market price levels for canned orange juice for the reason that our Florida packs of canned orange juice are on the average at least 10 times larger than the California packs of canned orange juice.

Q. Can you state in quantities what that 10 to 1 relationship [2610] is?

A. Well, the last two years Florida has packed about 17½ million cases of canned orange juice a year, and I don't even look at the California figures

(Testimony of Marvin H. Walker.)

very often, they become rather unimportant to us, but my guess would be California is packing not more than a million cases a year today.

Q. What effect has that on the fixing of prices at which California juice may be sold?

A. Of course, California canned orange juice is sold right here in Los Angeles. Our own company sells our own brand of good Florida orange juice right here in Los Angeles, California. The competing California prices are usually the Florida prices plus the freight differential, which would amount to possibly 70 or 75 cents a case. In other words, if we are selling canned orange juice at $2.00 a case f.o.b. Florida, and then shipping it to Los Angeles here, these California packers can get roughly $2.75 a case for their product in this market, and most of the California pack, to my knowledge, is distributed on the Pacific Coast here.

Q. What are the factors that enter into the fixing of prices of the Florida citrus products on a nationwide basis, Mr. Walker?

A. Supply of fruit available, consumer demand, all other demands that we might have, and at times our psychology on prices, how we feel about prices. Prices are the opinions [2611] of a lot of people.

Q. There has been some testimony in this record concerning the dumping by Pasco of a large quantity of orange juice in the summer of 1951. Are you familiar with that situation?

A. I have some recollection that Pasco, like

(Testimony of Marvin H. Walker.)

other large canners of Florida citrus juices, cut prices rather drastically along about June, 1951. Pasco Packing Company of Dade City, Florida, at that time it was, and still is the largest canner of citrus juices in Florida. In the period we have been discussing here, 1949 to 1951, I would estimate that Pasco was packing approximately 25 per cent of all of the citrus juices packed in the state of Florida. So, of course, the prices which they quoted had a very strong influence on market values generally.

Q. I understand in Florida there is what is sometimes called the two price system for citrus product fruit. Will you tell the jury what that two price system is and what its influence is on the cost of producing orange juice, single strength, by Florida packers?

A. If I correctly understand your question, it is that processors pay different prices for what we call juice oranges and concentrate oranges, for the oranges used in canned juice and the oranges used in frozen orange concentrate.

The organization with which I am connected packs [2012] both single strength canned juice and frozen concentrate. By the way, we also buy oranges on the open market like any corporate canner does, though we handle our own membership fruit on a co-operative basis.

There has been a difference in recent years, and there was certainly a difference, I think, in this 1949 to 1951 period, in the season average prices paid by Florida processors for the juice oranges

(Testimony of Marvin H. Walker.)

going into single-strength juice and the concentrate oranges going into frozen orange concentrate. That difference comes about by reason of the fact that most of the juice oranges are purchased in the early part of the season and are mostly the early and mid-season varieties, while the concentrators operate more heavily on the mid-season and late varieties. The concentrators can get a better quality pack out of the later oranges, and they can get better yields out of the later oranges.

By the way, I might explain that in Florida we have the Florida Canners Association, I think I was president of it in this 1950-51 season, and I am still a director of the thing, but it is primarily a statistical organization. All of the canners, all of the concentrators in Florida, are members of this association.

We furnish the association each week quite detailed information as to the number of boxes of fruits of different varieties we use, all the items that we pack, the prices that [2613] we pay for fruit, the yields that we get per box of fruit, and that is all mimeographed and comes to us in a report each week, so all the processors have detailed information. We have these weekly reports as to the prices paid in the preceding week by juice canners for juice oranges and the prices paid by the concentrators for the concentrate oranges.

Merely to illustrate the point—I hesitate to say anything after 1951, but I can remember what has

(Testimony of Marvin H. Walker.)

happened since then a little bit more clearly, so I would say——

Mr. Dixon: If the court please——

The Witness: Excuse me.

Mr. Dixon: I think this witness should confine his testimony to 1951.

The Court: Yes. Don't go beyond 1951, Mr. Witness. Have you answered the question asked you?

The Witness: I think that I have, your Honor. Because the juice canners get most of their oranges and put up most of their pack in the early part of the season, the price that they pay for juice oranges usually is less than the price paid by the concentrators for the later oranges.

Q. (By Mr. Strachan): I notice, Mr. Walker, you speak of quantities of fruit in terms of boxes?

A. Yes.

Q. Is that the customary usage in Florida as contrasted with the use of tons in measuring the pack in California [2614] oranges?

A. Yes. We never use the term tons in Florida. It is always boxes. A box of oranges in Florida is 90 pounds of oranges.

Q. So there would be a conversion factor of what? 20 boxes to 1?

A. A little over 22 boxes to a ton.

Mr. Strachan: That's all on direct examination. Mr. Dixon may have some questions.

Mr. Dixon: Yes, I think I do, counsel.

(Testimony of Marvin H. Walker.)

Cross-Examination

By Mr. Dixon:

Q. Mr. Walker, I think you said you prepared this exhibit that you referred to at the request of Mr. Finley of Sunkist, is that correct?

A. That's right.

Q. About six months ago? A. Yes.

Q. Did you have any discussion of this case with Mr. Finley at the time he requested you to prepare this exhibit?

A. To this extent. He phoned me long-distance from Tampa. He was coming to Lake Wales and wanted to see me. I was going to be out of town. He asked me if I could furnish him some information on our selling prices in those years, and [2615] he said that he had in mind using the information in connection with some lawsuit. I had no information whatever regarding the litigation at that time.

Q. Was there any suggestion made at that time that you would be glad to support those figures?

A. No thought of it at all, no discussion.

Q. How long had you known Mr. Finley, Mr. Walker?

A. At least 10 years, might have been 12 or 13.

Q. Mr. Finley is in charge of the processing of product oranges and grapefruit for Sunkist, is he?

A. I understand that he is the manager of their processed orange division, and most of the time—

(Testimony of Marvin H. Walker.)

I have met him when he comes to Florida once every year or two.

Q. Do you know what are the duties, if any, he performs for Exchange Orange or Sunkist?

A. No, I do not.

Q. Do you know whether he is in charge of the marketing of the citrus juice products processed by Exchange Orange for sale by Sunkist?

A. Well, I have understood that his position is somewhat similar to mine.

Q. Do you set the price in your association at which the, say, single-strength juice will be offered for sale to the public, Mr Walker?

A. Well, some days I do and some days I [2616] don't.

Q. Who does in your association, if you don't?

A. We have, of course, a sales department and we have a division of the sales department handling the canned product. We have a marketing manager and a canned products sales manager. Then we have a marketing committee. We have all these meetings and all these people, and we think we know what we are going to do, and then something happens and we have to do something different. I usually make the decision and we go ahead and do it.

Q. You are the one in your association who makes the decision on prices, are you?

A. Well, I usually try to let the others make the decision, but when I don't agree with them, I make it myself.

Q. Do you recall anything about whether there

(Testimony of Marvin H. Walker.)

was a surplus of citrus juice products on the national market right after the war, say in 1946 and 1947?

A. I was not in the canning business at that time.

Q. You probably wouldn't remember or know about that situation, would you?

A. No. I was not so close to the canning business.

Q. Then I am not going to ask you any questions about it. I think you testified that Florida produced substantially more single-strength juice and frozen orange juice than does California?

A. That's right. [2617]

Q. In 1951, I believe you testified that was about what ratio, do you recall?

A. In the year 1951—in the season 1950-51, as I remember, Florida packed approximately 20 million cases of canned orange juice.

Q. That is 24 No. 2's? A. Yes.

Q. And California in that year packed one million six—is that correct?

A. I would accept that figure, yes.

The Court: What figure did Florida pack?

The Witness: About 20 million.

Q. (By Mr. Dixon): That is 20 million cases of 24 No. 2's, is that what you call them, Mr. Walker?

A. I might explain, if I might, we pack canned orange juice in cans of different sizes.

Q. Yes, the jury knows that.

(Testimony of Marvin H. Walker.)

A. But we convert it all to this one size merely for comparative purposes.

The Court: What figure was that, for California?

Mr. Dixon: One million six cases, your Honor, of 24 2's, and I think the jury is already informed, if it is important, that there are 3.75 gallons to each case of 24 2's.

The Court: All right. Go ahead. [2618]

Mr. Dixon: That is 1,600,000 cases.

The Court: All right.

Q. (By Mr. Dixon): You say Florida establishes the price for orange juice, that is single-strength juice, sold in the United States?

A. Yes.

Q. Is that true out here on the West Coast, too?

A. Yes.

Q. I believe you said it cost about 75 cents a case for freight for a case of 12/46 to be shipped from your plant in Lake Wales, Florida, is it, to Los Angeles, is that the freight rate?

A. No. The freight rate is actually greater than that. This 70 or 75 cents was the difference between the average California rate and the average Florida rate.

Q. You said something about orange juice, single-strength juice, Florida juice, being sold. I believe, in June, 1951, for $2.40, something like that, a case f.o.b. Lake Wales, Florida. Now, at that time what would the freight have been, if you recall, for a shipment of that case? In other words, what

(Testimony of Marvin H. Walker.)

would be the delivered price to a wholesaler or retailer here in Los Angeles?

A. Well, I would estimate that for that year you would have to add 80 or 85 cents for a case of 46-ounce cans.

Q. About 85 cents? [2619]

A. Yes, in that neighborhood.

Q. So that would bring the price up to about what in June of 1951, delivered here in Los Angeles? A. That would be about $3.25.

Q. Do you know whether California was selling any single-strength juice in this market at that time?

A. I have no personal knowledge. I would believe that they would be selling some.

Q. From your knowledge of the California single-strength operations, when does the California Valencia single-strength juice come into the market, the national market, so to speak, as a rule?

A. During their period for harvesting Valencia oranges here, starting in about May of each year, I would say. [2620]

Q. Does Sunkist sell in your market in Florida?

A. No, sir.

Q. That is, single-strength juice?

A. No, sir.

Q. California juice doesn't get that far?

A. Not to my knowledge.

Q. Does it compete with Florida juice in any of the eastern markets? I am talking about single-strength Valencia juice, in, say, '51?

(Testimony of Marvin H. Walker.)

A. No, I don't believe that Sunkist competes with us in any eastern markets.

I am talking about the canned orange juice.

Q. That is what we are discussing, Mr. Walker.

What about the rest of the country, do they compete with you out here?

A. Well, I hesitate to answer a question like that right in the middle of California, but the best market——

The Court: You be frank, now.

The Witness: The best market that Florida Citrus Canners Co-operative of Lake Wales has for its frozen orange concentrate is Northern California. And I think that the last consumer purchase report that I saw for the Los Angeles market, in which our company does not operate to any extent, showed the Florida brands to be the largest sellers in this market.

Q. (By Mr. Dixon): But a processor out here, say in [2621] Los Angeles, of course, if they sold the product in the local market here, if they wanted to they could certainly undersell Florida juice, couldn't they?

A. Oh, yes, they could undersell us. And we could undersell them, too.

Q. Do you mean here, after paying the freight?

A. It depends on how badly you want the market that particular day.

Q. In other words, that is just a statement of the obvious, that if you don't have to pay this freight, that you have that, at least, freight ad-

(Testimony of Marvin H. Walker.)

vantage in your own market where the juice is processed? A. That's right.

Q. I believe you testified that all of the California, or substantially all of the California pack of single-strength juice was sold in the West Coast area? A. That is my belief.

Q. Do you know? Have you ever made any study of it to determine the extent to which California juice and Florida juice, single-strength Valencia juice, meets in any of the other States of the country, on the shelves of the retail dealers?

A. Through the years I have seen a great many reports, of course, on the sales of all kinds of canned citrus products, and all of the reports that I have seen would indicate that [2622] California sells most of its canned juices along the Pacific Coast.

Q. Do you know whether that is true with reference to frozen concentrate, too? Orange concentrate, I am talking about now.

A. It might not have been true in 1951.

Q. Why was that, will you tell the jury?

A. California made a serious endeavor to develop a distribution of California packed frozen orange concentrate, and they at one time packed substantially more orange concentrate than is packed in California today. The California pack of frozen orange concentrate has gone down very, very sharply.

Q. Mr. Walker, it is a fact, is it not, that the price at which, say, Sunkist single-strength Valencia juice is sold in California, say here in Los

(Testimony of Marvin H. Walker.)

Angeles, is substantially the same as the price at which Florida juice is sold here in Los Angeles?

The Court: Are you talking about juice or concentrate?

Mr. Dixon: I am talking now about single-strength Valencia juice.

The Witness: Generally speaking, yes.

Q. (By Mr. Dixon): With the freight advantage that any processor had here in this area, California processor had, it could, if it wanted to, considerably undersell the [2623] Florida juice in this, its own market, isn't that a fact?

A. Yes.

Q. Mr. Walker, you said something about your organization having a two-price system to processors of juices and frozen concentrate in Florida. Is that a correct recollection of your testimony?

A. You recall very well the question I was asked. I don't like the phrase two-price system.

Q. I am just using the language of counsel that asked the question.

A. That's right. You are correct.

Q. I believe you said that your organization charged processors of single-strength juice who came into the market early to buy the product oranges a lower price than your association charged the processor of frozen concentrate, is that correct, who came into the market later?

A. No. I think you are mistaken as to our function in Florida. We do not sell fruit to other processors.

(Testimony of Marvin H. Walker.)

Q. You don't sell any fruit to processors?

A. No. We buy fruit.

The Court: Wait.

The Witness didn't say that he sold. He said that the processor paid less for oranges for juice than they did for concentrate.

The Witness: Yes. [2624]

The Court: That is where you made your error.

Mr. Dixon: Thank you, your Honor. I misunderstood.

Q. (By Mr. Dixon): In other words, your association doesn't represent growers, is that correct?

A. We are a co-operative association of growers formed for the purpose of processing and marketing our own fruit.

Q. But you don't sell any product fruit to independent processors? A. No, sir.

Q. You process it all yourself and then sell both the fresh fruit in the fresh fruit market and the canned juice that you process from the by-product fruit that isn't sold in the fresh fruit market?

A. Our members are corporations and co-operative associations of growers which sell some fresh fruit. We don't sell any fresh fruit. All we do is to process fruit.

I would like to explain that in addition to processing the fruit delivered by our own members, that we go into the open market and buy additional quantities of fruit.

Q. In other words, you do buy some, shall we

(Testimony of Marvin H. Walker.)

say, by-product oranges to be processed into single strength juice or frozen concentrate, is that correct?

A. That is correct.

Q. Did I understand you correctly that when you are buying oranges, that is by-product oranges for processing [2625] into single-strength juice, that you pay a lower price than when you are buying oranges to process into frozen concentrate?

A. No, sir.

Q. Tell me about the two-price system referred to by counsel.

A. We, as canners and concentrators, buy oranges this week, that week, the following weeks, we buy some of them for juice, some of them for concentrate, and there is not much difference in the price of oranges in any one week. Now, we will buy our juice oranges in the early part of the season, when prices normally and historically are at lower levels for these poor oranges; we will buy the concentrate oranges later in the season when the quality is better, we have got to pay a higher price for the concentrate oranges.

That is where the phrase two price comes in. We are not paying two prices for oranges; we are paying the same prices. The prices will fluctuate greatly during the season.

Q. Is the price that you pay at any time based on anything like the soluble content per ton?

A. It has to a limited extent only in the last few years. In 1951 it was not. Everything was on a box basis at that time.

(Testimony of Marvin H. Walker.)

Q. Do you know what the California system was in 1951 on which the selling price of product Valencia oranges to [2626] independent processors was based?

A. I was out here about that time, and as I remember it, the California price was based on a ton which represented 110 pounds of solids.

Q. Soluble solids? A. Yes.

Q. But Florida doesn't use that system?

A. Florida is still using the box price.

Q. In other words, in Florida you sell by the box and not by the soluble solids per ton basis?

A. A few processors, like ourselves, have started to buy oranges on the basis of so many cents per pound of fruit solids. We don't buy it on a ton basis, but 85, 36, 37 cents a pound of fruit solids.

Q. Getting back to this two-price system, I just want to be sure that I understand what was meant by it. Am I correct in my recollection that you stated that the juice canners pay less than the concentrators to process later? I mean the ones who are processing into frozen concentrates.

A. I am not sure that I have the question. Do the June canners?

Q. Juice.

The Court: Read the question.

(Question referred to was read by the reporter as follows: [2627] "Getting back to this two-price system, I just want to be sure that I understand what was meant by it. Am I cor-

(Testimony of Marvin H. Walker.)

rect in my recollection that you stated that the juice canners pay less than the concentrators to process later? I mean, the ones who are processing into frozen concentrates.")

Mr. Dixon: The question is rather awkward.

The Witness: Normally, and I am sure this was true in the '49-51 period, and I am sure——

The Court: Let me ask a question.

Is that price differential based on the law of supply and demand?

The Witness: No. It is based on quality.

The Court: It is based on quality, but it is also based on the law of supply and demand? If you had more of a demand for the poor quality goods, would that increase the price of the goods?

The Witness: Well, demand is some factor, I will readily admit.

The Court: The quality of the goods?

The Witness: Quality is the big reason for the difference in the prices paid for the juice oranges and the concentrate oranges.

The Court: Is the price fixed by any price that is set by any company? [2628]

The Witness: No, sir.

Mr. Dixon: Thank you very much, Mr. Walker.

Mr. Strachan: I have one or two questions, Mr. Walker.

(Testimony of Marvin H. Walker.)

Redirect Examination

By Mr. Strachan:

Q. I show you again Exhibit BY. From that exhibit it appears, does it not, that there was a period in which your products were out of the market, sometime in 1949 I believe?

A. That is correct, the three months of October, November and December, 1949, we did not have any unsweetened orange juice and did not sell any unsweetened orange juice.

Q. In times like that it would be true, would it not, that the geographical market for California juice might be extended?

A. Yes, very definitely so.

Q. But those would be abnormal times, would they not? A. That is right.

Q. Based on your knowledge of the industry, do you know whether there are any factors that affect the cost of producing orange juice in Florida that would make that cost higher or lower than the cost of producing fruit and orange juice in California?

Mr. Dixon: What year, counsel? Or are you talking generally?

Mr. Strachan: In general. [2629]

Mr. Dixon: I would like to have the question specifically directed to a particular time, your Honor.

The Court: Read the question.

(Question read by the reporter.)

(Testimony of Marvin H. Walker.)

The Court: If you know.

The Witness: Most Florida——

The Court: Objection overruled.

The Witness: Most Florida costs, citrus costs, are lower than California costs.

Q. (By Mr. Strachan): What are some of the factors that enter into that, if you can recall them?

A. Land values, labor costs.

Q. Both of those are lower, in Florida, than in California?

A. Yes, sir. The only cost item that I can recall that is higher in Florida than in California is the fertilizer cost item. We raise our oranges on a sandy soil and are completely dependent upon fertilizers down there. But our other production costs, and our processing costs are all quite substantially lower than your California costs, and that is true of all processed products.

Q. Do the Florida growers have the irrigating problems and costs such as are incurred in California?

A. Florida does not irrigate as extensively as does California. We don't have the grove firing costs. There are [2630] a number of important costs out here which we do not have in the production of fruit in Florida.

Q. Does Florida use the system that is followed in California of sending the fruit from the groves first to the packing houses, and then from the packing houses to processing plants?

(Testimony of Marvin H. Walker.)

Mr. Dixon: If the court please, I think this is wholly outside the scope of the examination.

The Court: What is the materiality of that? Haven't we pretty well exhausted the Florida witness?

Mr. Strachan: Mr. Dixon's cross-examination was directed to showing that because of the 75 or 80 cent or 70 cent transportation factor, that California growers had that much of an advantage in the California market, and I want to show that offsetting those are lower production costs in Florida, and that enables them to compete here notwithstanding the freight differential.

Mr. Dixon: If the court please, this witness testified that they couldn't compete here on the price situation. That is his testimony, to my recollection.

The Court: That is my recollection.

Mr. Strachan: I will put another question, then.

The Court: He said California could undersell Florida in its own market.

Q. (By Mr. Strachan): Would the lower production costs [2631] in Florida production permit the Florida juice to compete, pricewise, in the California market with the California products?

A. Yes, sir.

Q. And that is notwithstanding the freight differential? A. That's right.

Mr. Strachan: That is all.

The Witness: Our own——

The Court: Now, which do you mean? You have told us that you could compete with California pro-

(Testimony of Marvin H. Walker.)

ducers, and you have told us that California could undersell Florida.

The Witness: Your Honor, I understood Mr. Dixon's question was, could California sell at a lower price in its home market here.

Why, certainly it could sell at a lower price in its home market. California packers could reduce their prices just as much as they want to any day of the week.

Q. (By Mr. Strachan): You didn't mean that they could do it at a profit, did you?

A. No, siree. It just depends on how much you want that particular market.

On some of our canned and processed products we can pack them and deliver them more cheaply in California than California packers can. [2632]

The Court: What products are they?

The Witness: Frozen orange concentrate is a good example of it. That is the biggest product we have.

Mr. Dixon: If the court please, I hate to carry on this, but I would like to clear up this situation. It won't take me very long, I think.

Recross-Examination

By Mr. Dixon:

Q. I think I really have been misled now, Mr. Walker. You say that because of the lower labor cost in Florida, and what was the other factor?

A. Lower fruit production cost to begin with.

(Testimony of Marvin H. Walker.)

Q. You mean producing the fruit?

A. Producing the fruit.

Q. That Florida could, because they would have a cheaper fruit and because labor would be cheaper, they could process the same product in Florida, single-strength Valencia juice, and pay the freight at 80 or 85 cents per case, and sell it in the California market here in Los Angeles at a price which would be at least equal with the cost of California processing and selling that product in this market? Is that what you want this jury to believe?

A. Your Honor, I find the question a little difficult to answer, because of the way our cost factors vary constantly. [2633]

Q. Let me ask you this question, then, and maybe the whole thing will be out. Have you ever made and do you have any knowledge of the actual cost of producing single-strength Valencia juice in the state of California by Sunkist?

A. No, I have no records or any information whatsoever on——

Q. So that you are in no position——

A. Not in recent years. I have obtained the information in other years, but I paid no attention to it in recent years.

Q. Did you have that information when you made your statement about 1951?

A. I have taken the trouble to develop that information particularly on frozen orange concentrate.

Q. I am talking, Mr. Walker, about single-

(Testimony of Marvin H. Walker.)

strength Valencia juice and the cost of producing it here in California. Do you of your own knowledge know anything about the cost of producing a case of single-strength California Valencia juice here in the state of California by Sunkist?

A. To some extent.

Q. Did you have that information in 1951?

A. I have had some general information throughout all the years on California costs.

Q. My question is, did you have that information in [2634] 1951? A. Oh, yes.

Q. From whom did you get it?

A. From a great many packers here. I would make a trip to California and go around to the canning plants and I would ask the various people here how much are you paying for workers in these plants, and then I get these various reports on the California citrus industry which show the cost of production of their fruit from year to year and the changes in their fruit production records, and we have these meetings in Washington where we sit down with representatives of the Department of Agriculture and California people and exchange a lot of this information.

Q. Mr. Walker, I am talking now about specific information which you got concerning the cost of producing or processing single-strength Valencia orange juice in California in 1951. I will again ask you the question. From whom did you get such information? That is the first question.

A. I am not sure I was here in 1951.

(Testimony of Marvin H. Walker.)

Q. I thought so. Did you get it at any other time? A. Oh, yes.

Q. From whom and when?

A. Well, I have visited practically every citrus processing plant that they have in California.

The Court: Let's wait a minute. Are you talking about [2635] the processing cost or are you talking about production cost plus processing cost?

The Witness: I am talking about production cost and processing costs, both of them.

The Court: Has Sunkist ever listed what their production cost of growing oranges is, to your knowledge?

The Witness: No, not Sunkist. I have seen the composite average California figures that are compiled and reported.

The Court: You mean cost figures?

The Witness: Yes.

The Court: Do you understand what a farmer co-operative is?

The Witness: Oh, yes.

The Court: The farmer gets back for his fruit what eventually it can be sold for?

The Witness: That's right.

The Court: Can you tell me how you can figure the cost figure from that?

The Witness: Yes. These farmers maintain records of what their fertilizer cost is, what the cost is to irrigate, the cost is to fire groves, what their taxes are, and they report those, I think to their

(Testimony of Marvin H. Walker.)

state university or state extension service out here. That information is compiled the same way it is compiled in Florida, and each year they come out with a report on the average cost of production in the [2636] state of California for that year.

Q. (By Mr. Dixon): I understand, Mr. Walker, that there is certain statistical data that is available to everybody in the industry that is prepared by the Department of Agriculture. I am not talking about that. I am asking you if you have any knowledge, personal knowledge, apart from anything that is in the government public records, concerning the cost of processing single-strength Valencia oranges in the state of California in the year 1951?

A. No, sir. I don't recall that I was here in 1951 and I would not say that I have any personal direct knowledge of it.

Q. Do you have such information concerning the cost of processing single-strength Valencia juice in California for the year 1950 of your own knowledge?

A. Well, I have had cost information on some of those years and I just can't recall which of those years it was.

Q. I realize it is quite a long time ago, but can you tell us and this jury just where you got it, from what processor you got that information, if you got it from a processor?

A. No. I did not get it from the Sunkist people here.

Q. That isn't my question, Mr. Walker. My

(Testimony of Marvin H. Walker.)

question is, can you tell this jury from what processor you got that information? [2637]

A. I have discussed costs and different items of costs——

Q. My question relates to single-strength orange juice.

A. ——with products like Real Gold or Mutual Orange Distributors at the time that they were in the business, and people like that, just traveling around visiting these plants.

Q. You mean you did this in 1950?

A. I wouldn't say that I was here in 1950.

Q. What about 1949?

A. I know I was here in January, 1949, that I can remember.

Q. Was that the time you got this cost information on which you base your answer that because of the processing cost, labor, and so forth——

A. No, it was not. I might have picked up some of the information at that time, but the impressions that I have and the beliefs that I have——

Q. The jury isn't interested in your impressions, Mr. Walker.

Mr. Strachan: I think it is more correct to say that Mr. Dixon isn't interested.

Mr. Dixon: I certainly am not interested in impressions.

The Court: Let's not argue about it. Impressions, as we all know, don't count. It is knowledge and belief.

The Witness: Your Honor, the knowledge and

(Testimony of Marvin H. Walker.)

the belief I [2638] have about the differences in the Florida and the California costs are based on countless conversations I have had with people in the last 20 years.

Q. (By Mr. Dixon): I'm sorry, Mr. Walker, but my question was directed to particular years, because I thought you said that you knew that it couldn't be done because of the labor differential in costs in Florida, and I think there was the cost of fruit or some other item, I don't recall, and the purpose of my question was to determine whether in fact you did have any knowledge that you acquired concerning the cost of processing single-strength Valencia juice in California in the years 1949, 1950 and 1951, and I understand your answer to that is that you do not have any such information.

A. That's right, sir. [2639]

* * *

(The following proceedings were had outside the hearing and presence of the jury:)

Mr. Strachan: I mentioned this morning I was in the process of making a selection of documents from the files presented by the plaintiff and I have here a group of documents which I have selected that I would like to tender to Mr. Dixon. I have no idea when I will put them in. As I select more, I will give them to him.

The Court: All right. [2640]

Mr. Strachan: That's all I have. Thank you.

Mr. Dixon: I understand that you intend to use all of these documents, is that correct?

Mr. Strachan: No, that is not correct.

The Court: Is this the group you spoke of about 40 or 50 documents where you thought you might use 40, but you didn't know whether you would use all of them?

Mr. Strachan: That's right.

The Court: What are they? Mostly letters?

Mr. Strachan: They are all either Anagrams or letters written to or by the plaintiff.

The Court: And they come from the records of the company?

Mr. Strachan: Yes, sir.

The Court: All right. I think that is sufficient. It is preferable if counsel can say he is going to introduce them all, but we don't want to make a lawyer dishonest merely to get over a requirement of the court. Mr. Strachan can say, "I am going to offer them all," and next week he can say, "I have changed my mind. I am going to offer 20 of them. I am not going to offer all of them."

I don't think the burden is onerous.

Mr. Dixon: The only reason is I hate to have to spend a lot of time going into these things unless I am reasonably certain counsel is going to use them. [2641]

The Court: That is why I asked what they were. They are supposed to be letters and Anagrams. If they were contracts or something like that, it would be different, but letters can be looked over rapidly.

Mr. Strachan: I think I have already given Mr.

Dixon practically all of those at another [2642] time.

* * *

CLARENCE C. TAYLOR

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Clarence C. Taylor.

Direct Examination

By Mr. Strachan:

Q. What is your name?

A. Clarence C. Taylor.

Q. What is your occupation, Mr. Taylor?

A. I am the secretary of the Mutual Citrus Products Company of Anaheim, California.

Q. Will you describe briefly that company and the nature of its operations? [2646]

A. We are processors of citrus fruit, making citrus juices, pectin, citrus oil.

Q. How long have you been connected with that company?

A. Since its incorporation in 1928.

Q. What is your professional training, Mr. Taylor? A. I am a chemist.

Q. Have you practiced your profession with respect to the citrus products industry during the time that you have been engaged in that business?

A. Yes.

(Testimony of Clarence C. Taylor.)

Q. During the summer of 1951 were you contacted by Mr. James Finley of Exchange Orange Products Company with a view to working out a processing contract with EOP? A. I was.

Q. Can you fix about the time of that contact?

A. Not definitely, no. It was in the summertime. During the Valencia season is all I can say.

Q. Can you say whether it was in May, June or July?

A. Well, it was probably from July on. I can't place it definitely.

Q. And that discussion was with respect to processing oranges into what product, if you recall?

A. Into orange concentrate.

Q. Frozen, or——

A. I wouldn't say definitely. It may have been either [2647] hot pack or frozen. We make both, and I don't exactly remember.

Q. Did you work out with him the terms of an arrangement under which you would be willing to process the fruit?

A. We did in a general way, but we never packed any. The cans were delivered, and for some reason or other we failed to pack any for them. So there was nothing definite.

Q. You say that cans were delivered; do you mean by that that Mr. Finley had the cans that were to be used, in the event you processed oranges for him, delivered to your plant?

A. That's right.

(Testimony of Clarence C. Taylor.)

Q. And then no fruit was delivered for processing, is that correct?

A. We may have had one or two loads, but I don't—because, as I remember, we were going to establish a processing cost, and we didn't process any—whether it was our fruit or his fruit to obtain the yields. I don't remember, but we didn't pack any in his cans, I do remember that.

Q. So at most you made some trial runs to determine whether you could fulfill the contract, is that it? A. That is right.

Q. And eventually EOP took the unused cans back? A. That's right.

Q. Mr. Taylor, you are appearing here today in response to a subpoena served on you by the defendants in this [2668] case, is that correct?

A. That is correct.

Q. Prior to the service of that subpoena, were you subpoenaed to appear as a witness on behalf of the plaintiff in this case?

A. A subpoena was served in the name of the company, yes.

Q. And did that subpoena call on you to prepare a statement as to your fruit purchases, orange purchases, in the years 1950 and '51?

Mr. Dixon: If the court please, I object to any questioning of this kind. I will admit that we requested certain information, and I got it. Now, if counsel wants the same information, it is coming pursuant to his subpoena. I want that clear in the record. And I object to any further reference to

(Testimony of Clarence C. Taylor.)

any subpoena that may have been served upon this company duces tecum by the plaintiff.

The Court: I don't think it has any part in the proceedings.

You subpoenaed the witness here, Mr. Strachan.

Q. (By Mr. Strachan): Did you prepare from the books and records of the company a statement of the orange purchases by your company for the years 1950 and '51?

A. Our bookkeeping department did prepare such a statement. [2649]

Q. One statement for 1950 and another statement for 1951? A. That is correct.

Q. Do you have those statements prepared by your bookkeeping department with you?

A. I do. [2650]

Mr. Strachan: I will ask that this document headed 1950 be marked as an exhibit.

The Clerk: Defendants' Exhibit BZ for identification.

(The exhibit referred to was marked Defendants' Exhibit BZ for identification.)

Mr. Dixon: May we see it, counsel?

Mr. Strachan: Yes, sir.

The Clerk: And for 1951 I am marking CA for identification.

(The exhibit referred to was marked Defendants' Exhibit CA for identification.)

Mr. Dixon: Is this what you gave me yesterday?

(Testimony of Clarence C. Taylor.)

Mr. Strachan: Yes, sir. I think so.

I will offer Exhibits BZ and CA in evidence.

Mr. Dixon: Just a moment. I think we should know what they are. In this form, your Honor, I certainly object to this exhibit going in, because there is no indication of the price, how it is determined or on what basis. In this form I certainly object to the exhibits as misleading on their face. Nothing whatsoever in the record so far, your Honor, further, to indicate or support any of the price statements contained in this exhibit.

The Court: Well, lay some further foundation, Mr. Strachan. I don't understand them from looking at them.

Q. (By Mr. Strachan): I show you the Exhibit BZ, which is headed 1950, and ask you if in the column approximate cost [2651] you have stated the approximate cost of the quantity and type of navels by month shown opposite those costs.

A. We have, January to April.

The Court: By cost, do you mean what you paid for them?

The Witness: The number of tons and the cost.

Q. (By Mr. Strachan): The cost per ton?

A. The cost per ton.

The Court: What you paid for them?

The Witness: That is correct. [2652]

* * *

Q. With respect to the months from May through December under the column Valencias, you show the tonnage purchased and opposite those in

(Testimony of Clarence C. Taylor.)

August, September, October, November and December, you show the approximate cost per ton, is that correct? A. That is correct.

The Court: Was that price per ton figured on the basis of solids per ton?

The Witness: Part of them may have been. We buy some of them off the groves by the box, some of them from the packing houses, that had no basis of soluble solids, and at the present time we are buying some on the basis of soluble solids. However, these I don't believe were, because when you buy on the basis of soluble solids, it runs into odd [2653] figures.

The Court: That is, cents?

The Witness: Yes.

The Court: You have some cents after the dollar?

The Witness: Yes. It doesn't come out even.

The Court: Go ahead, Mr. Strachan.

Q. (By Mr. Strachan): You show a total of the tonnage of oranges of the navels and totals of the Valencias, is that correct?

A. That is correct.

Q. And you distinguish there between the oranges purchased from Sunkist and those purchased from others, is that correct?

A. That's right.

Q. Now, I show you Exhibit CA and ask you if that is prepared in the same manner, showing by months the purchases of navels in February only, with no cost per ton shown, but as to the Valencias

(Testimony of Clarence C. Taylor.)

showing purchases from May through November and the cost per ton of those Valencias, is that correct? A. That is correct.

Q. And showing, also, that none of those purchases were from Sunkist in 1951, is that right?

A. That is right. [2654]

Mr. Strachan: I now offer, again, Exihibts BZ and CA.

Mr. Dixon: I still object, your Honor, solely on the basis previously given, and just ask the right to ask a question of this witness concerning the cost per ton figure on this exhibit.

The Court: All right. You may inquire.

Mr. Dixon: Mr. Taylor, is it a fact that the cost per ton figures that you have here are based on just the tonnage of oranges delivered without any reference whatever to the soluble content of the orange?

The Witness: I believe that is correct.

Mr. Dixon: In other words, you are familiar, are you, with the Sunkist pricing schedule and the manner in which their price is determined?

I have an exhibit here if you don't know, and I can——

The Court: The witness said he is familiar with soluble solids prices.

The Witness: Yes, in a general way I know what you are speaking of.

Mr. Dixon: These figures, then, that you have in your cost per ton column for '51 for Valencias is not in any way based upon the soluble content?

(Testimony of Clarence C. Taylor.)

The Witness: That is correct.

Mr. Dixon: That is what I want to know.

Subject to that explanation, your Honor, I have no objection [2655] to the exhibits.

The Court: Received in evidence, BZ and CA.

* * *

Mr. Strachan: From the sheet of 1950 I read the following, Exhibit BZ:

Navels:

January—24.59 tons	$20.00
February—382.115 tons	$20.00
March—626.27 tons	$19.00
April—62.17 tons	$18.00

Now as to Valencias:

May—151.04 tons	No cost stated
June—9.44 tons	No cost stated
July—201.60 tons	No cost stated
August—962.155 tons	$38.00
September—897.65 tons	Cost $40.00
October—407.662 tons	$45.00
November—56.79 tons	$45.00
December—67.46 tons	$48.00

Total tons of oranges purchased from other than Sunkist 1,095.145.

Total tons of Valencia oranges purchased 2,753.797 tons.

Total tons of Valencia oranges purchased from Sunkist 39.22 tons. Approximate cost $34.00.

(Testimony of Clarence C. Taylor.)

I am reading from Exhibit CA, which is headed 1951. It covers a period from February through November.

Navels:

February—13.65 tons .....No cost indicated

Valencias:

May—95.275 tons .....Cost $35.00
June—98.050 tons .....Cost $35.00
July—122.440 tons .....$35.00 per ton
August—176.120 tons .....$30.00 per ton
September—334.755 tons $30.00
October—1220.98 tons .....Cost $35.00 per ton
November—384.68 tons .....$35.00 per ton

Total tons of oranges purchased from other than Sunkist:

Navels: 13.65 tons.

Valencias: 2,432.30 tons.

None purchased from Sunkist in 1951.

Mr. Dixon: May the record show, your Honor—I thought [2657] when counsel was offering the exhibit, he was only offering the one on '51. I assume my questions and objections with reference to the figures for '50 also apply to that document.

Mr. Strachan: I will stipulate that they can be applied and pertain to both documents.

The Court: All right.

Q. (By Mr. Strachan): You did actually purchase Valencia oranges during '50, the year 1950,

(Testimony of Clarence C. Taylor.)

and '51, from sources other than Sunkist, and at prices other than the Sunkist posted price which is related to soluble solids; is that correct?

A. We purchased——

The Court: Now, you have got two questions in one.

Q. (By Mr. Strachan): During the years 1950 and '51 you purchased oranges on a tonnage basis without adjustment or reference to the soluble solid content of the juice? A. That is correct.

Q. And during both years you purchased quantities of oranges at prices other than the Sunkist posted price?

Mr. Dixon: Just a moment. I think that question is clearly improper unless this witness is presented with the price sheet and asked that question, your Honor. Otherwise how could it possibly be related? If I understand his question.

Mr. Strachan: I thought the record was clear here that [2658] in '51——

The Court: There is a question you can ask which does the same thing you want to accomplish, but the question you have asked is, "Did the price" —read the question, Mr. Reporter.

(Question read by the reporter.) [2659]

The Court: There is more to it than that. That is the first question.

The Reporter: That is the last question to which objection was made, your Honor.

The Court: There was more to it, something about posted price with reference to soluble solids.

(Testimony of Clarence C. Taylor.)

Mr. Strachan: You sustained an objection to that and I reput the question in two parts.

The Reporter: Shall I read the record? That was the last question. The question I just read was the one to which an objection was made.

The Court: Read it again.

(Record read.)

The Court: You see, that raises a different question. The Sunkist prices started out in 1940 tied with soluble solids, and on the exhibit we have in evidence it could run up or down depending on soluble solids. Now, how can this witness answer that he purchased at a price other than the Sunkist price unless he knows what the soluble solids were. Maybe by chance some of the oranges he got were at the price just happenstance.

Now, you may inquire whether on these purchases any check was made as to soluble solids or to the Sunkist prices, but as worded, I don't know how anybody could answer it without more information as to the soluble solids of the oranges. [2660]

Mr. Dixon: That was the basis of my objection, your Honor, that the question could not be answered.

The Court: All right.

Q. (By Mr. Strachan): Were the purchases which you made in 1951 at prices that have been indicated made with reference to the soluble solids content of the juice?

A. As far as I know, none of them were.

(Testimony of Clarence C. Taylor.)

Q. Now, will you tell us whether as a chemist it is necessary that a processor of single-strength Valencia juice take into account the soluble solids content of the orange juice in order to pack single strength?

A. No. It is not necessary for single strength, except that insofar as it affects the general flavor.

Q. So if you have an acceptable palatable flavor in the product, the soluble solids make no difference to the single-strength packer, is that correct?

A. That is true.

Q. From what sources did you purchase oranges during the years 1950 and 1951?

A. We buy some oranges direct from growers on the tree. We buy some from Mr. Morgan Ward, who acts as sales agent for independent processors. We raise a few ourselves. And other packing houses. We buy on the open market.

Mr. Strachan: That's all on direct. [2661]

Cross-Examination

By Mr. Dixon:

Q. Mr. Taylor, I believe I was informed Mutual Citrus Products did not make or process any single-strength Valencia orange juice in their processing plant in 1951. Is that correct?

A. That is correct.

Q. These oranges that counsel has been asking you about went into other products that your company was processing, is that correct? A. Yes.

Q. I believe you also stated that with reference

(Testimony of Clarence C. Taylor.)

to soluble solids of oranges, that that is a factor which in a sense determines the flavor of the juice that is processed, if you are processing the oranges into single-strength juice, is that correct?

A. It is one of the factors.

Q. So that if you didn't know what the soluble solids of the fruit were, you would be very likely to take a chance in processing them into single-strength juice, would you not?

A. Would not, you say?

Q. Yes, without knowing the flavor.

A. I believe you would. You would always check the flavor if you were canning.

Q. But you do know that the price schedule insofar as [2662] you are aware of it of Sunkist is based on the soluble solids content per ton, is that correct? A. So I have been informed.

* * *

JOHN A. LYNCH

(Continued)

a witness called on behalf of the defendants, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Strachan:

Q. Mr. Lynch, I show you a document that has been marked for identification BF and ask you if that document was prepared by you and under your direction and supervision? A. It was.

(Testimony of John A. Lynch.)

Q. Was it prepared by you from the books of account and records of Winckler-Smith Company that were submitted for your inspection and examination? A. It was.

Q. Does it truly reflect what is shown on those books [2663] and records according to usual and accepted and normal accounting practice?

A. It does.

Mr. Strachan: I offer it in evidence, your Honor.

Mr. Dixon: I certainly object to it, your Honor. There is nothing in the record from this witness, according to my recollection, concerning many of these items that are set forth in this exhibit.

The Court: Well, I am going to permit exhibits on the financial statement of the company, but let me inquire.

Is this the type of exhibit such as BC and BD, and BG, where you made adjustments according to what you considered good bookkeeping practice, or is this merely a lifting of figures carried over on a summation sheet for various years?

The Witness: No, your Honor. This is taken from the books and records and is a pertinent part of a balance sheet in all instances and is usually presented in that manner.

The Court: I know, but have you just taken figures from the various balance sheets, or have you made adjustments as to what you thought was good bookkeeping practice? That's a simple question. You can answer that yes or no.

(Testimony of John A. Lynch.)

The Witness: Would you repeat that? I have made ordinary adjustments through the years, but they have all been reflected on the company books through the surplus account. This is an analysis of the surplus account. [2664]

The Court: But there are two different types of exhibits that have gone in here. In one instance, you will recall, they are of current assets and liabilities.

The Witness: That's right.

The Court: You picked up the exact figures from various statements of the company and carried them over, do you recall that?

The Witness: Yes, your Honor.

The Court: Which was in BB, and to make a comparison year by year of what was shown on those balance sheets of the company.

The Witness: That is correct.

The Court: Now, in BC, BD and BE, you, as it were, reconstructed a statement according to what you considered good bookkeeping practice, right?

The Witness: Right, from the books, your Honor.

The Court: From the books.

The Witness: That is correct.

The Court: But you didn't lift certain statements, it was not a compilation of statements from various accounts, it was your inspection of the books with adjustments based upon things you found in the books, adjustments made according to your idea of good bookkeeping practice?

(Testimony of John A. Lynch.)

The Witness: That is correct.

The Court: Now, my question is a simple one. Is BF [2665] the same as BB where you merely picked up the figures on surplus from the accounts year by year and run them into columns, or is BF a case where you have adjusted the surplus account as you as a CPA read the books?

The Witness: It is adjusted for one item, depreciation, which is small.

The Court: But it is an adjusted statement?

The Witness: That is correct, your Honor.

The Court: All right. Now, am I correct in my assumption, Mr. Strachan, that your exhibits BB on current assets and liabilities, and BC on a month by month current assets and liabilities matter, BD on statements of income, BE on comparative balance sheets, BF on surplus, the one we are talking about now, would complete the reconstruction, as it were, as to what you think the books of the company show?

Mr. Strachan: If I understand your question, your Honor, my answer would be that that would complete our showing as to what the books show in regard to the working capital, as to the current assets and current liabilities, as to the profit and loss statement or income account, and as to the assets and liabilities statement——

The Court: Well, let me put it this way, because my question probably isn't fair and it would be hard for you to answer.

The plaintiff has offered in evidence year by year

(Testimony of John A. Lynch.)

and [2666] at six months intervals statements—the plaintiff offered for the canning years 1949, 1950 and 1951, the fiscal years ended January, 1950, 1951 and January, 1952——

Mr. Strachan: Yes.

The Court: ——offered a balance sheet and statement sheet of assets and liabilities and had a CPA to testify to what they showed.

Now, as to this great number of exhibits, I am going to permit you to show what your CPA thinks the books show, reconstructed as he wants to. My question generally is, is this series of exhibits that I have listed from BB to BF those exhibits on your part which would be, as it were, in rebuttal to plaintiff's showing?

Mr. Strachan: That is right.

The Court: All right. I think the headings on these statements should be corrected, and you can do that by consultation with counsel, for the reason that each one starts with the name of the company at the top, properly so, because that is what is concerned, but I don't want any confusion as to what this is.

As I understand it, BB was worked out on a different basis than BC, BD, BE and BF. In other words, let's get this straight, Mr. Witness. The BB, in order to make a comparison for the various years, you picked up the current assets and current liabilities as shown on the books of Winckler [2667] & Smith as kept by their CPA and merely transferred them onto this sheet as a compilation?

(Testimony of John A. Lynch.)

The Witness: They are not reflected in categories on the books, your Honor. I picked those off the CPA's statements as he presented them. The general ledger of a set of books starts cash, accounts receivable, and keeps on going without a control account called the current assets, and you just pick them off yourself and classify them. I picked those from the statements.

The Court: Then this again, like the others, consists of your interpretation of what should be classified as current assets and what should be classified as current liabilities?

The Witness: No, your Honor.

Mr. Strachan: I think as to BB, which is the comparison for the three years before the Chapter XI and three years after Chapter XI, the testimony was that those figures were taken, for the first period, at least, were taken from the Hodge reports, because we didn't have access to the books and records for that period, at least in time to make our own analysis. I believe the testimony is——

The Court: Well, wait just a minute. I am still confused. I think my first supposition was correct.

Mr. Strachan: Let's ask the witness.

The Court: Mr. Witness, taking your Exhibit BB, let's refer down here to January 31, 1950, where you listed current [2668] assets and current liabilities.

The Witness: Yes, your Honor.

The Court: When I look at Exhibit 61, under current assets I find the same figure.

(Testimony of John A. Lynch.)

The Witness: That is correct.

The Court: That you had picked up from this report and put in here.

The Witness: That is a recapitulation of Mr. Hodge's statements.

Mr. Strachan: Will you speak so the jury can hear you, Mr. Lynch?

The Witness: I beg your pardon?

Mr. Strachan: I don't think the jury heard your last answer.

The Witness: I stated that Exhibit BB is a recapitulation of the current assets and current liabilities as reflected on Mr. Hodge's statements.

The Court: Then I looked under the total given on Exhibit 61 for current liabilities, $99,885, and I find you have the same figure.

The Witness: That is correct, your Honor.

The Court: Then is my supposition correct that as to BB, you went through the reports of the company and took the totals shown on the reports of the company as current assets and current liabilities, and then summarized them on this [2669] Exhibit BB?

The Witness: That is correct.

The Court: Without making adjustments which you as a CPA would think you would have done if you had been running this?

The Witness: That is correct, sir.

The Court: That's what I thought. That is BB.

Now, as to BC, which was the month-by-month

(Testimony of John A. Lynch.)

assets and liabilities, and BD, BE and BF, the balance of the series, you, in addition, first of all, took everything you have on there somewhere from the books of the company, right?

The Witness: That is correct.

The Court: But on those exhibits you exercised your judgment as a CPA as to how you would have adjusted certain things?

The Witness: With the exception of BB, I did not adjust my——

The Court: BB we have covered.

The Witness: BC, my error. BC is actually for books unadjusted, but I had to use my opinion as to whether I would include prepaid expenses where Mr. Hodge includes it as other assets. [2670]

The Court: All right. So, therefore, as to BC, BD, BE and BF, these reflect your judgment as to how you would have, in whole or in part, worked these matters out?

The Witness: That is correct.

The Court: Have we got that clear? Are you satisfied?

Mr. Strachan: It seems clear to me, your Honor.

The Court: All right. BF will be received in evidence. The objection will be overruled.

(The exhibit referred to was received in evidence and marked as Defendants' Exhibit BF.)

The Court: Going back now to titles. Most of them have the heading of Winckler & Smith, and the other exhibits of the company have the same

(Testimony of John A. Lynch.)

kind of a heading. I think there should be a statement along the nature of what we have just brought out by the witness. In other words, take BD, it says "Comparative statements of income." There should be some statement that counsel can agree upon that properly identifies it.

Mr. Strachan: The jury has heard the testimony, and I think it is probably as clear to them at least, as it is to me.

I wonder if in order to accomplish what your Honor has in mind we might simply mark under the identification "Lynch," or something of that sort.

The Court: We can discuss it later and see what we [2671] should do.

Mr. Strachan: I would like to have copies of the exhibit just received distributed to the jury.

The Court: BF?

Mr. Strachan: Yes, your Honor.

The Clerk: We have multiple copies.

The Court: As to this series of exhibits that we have just been talking about, BB through BF. which is in substance your position in rebuttal to Plaintiff's position on these financial statements of the company, these copies may be passed to the jury, and extra copies may be marked, Mr. Clerk. if you haven't done it.

The Clerk: It was in a set, 14.

The Court: So presently we are concerned with BF.

Q. (By Mr. Strachan): Mr. Lynch, I wish you

(Testimony of John A. Lynch.)

would refer to Exhibit BF and tell us how it was prepared, explain the relationship of the various items appearing thereon.

A. Exhibit BF, the statement of surplus and retained earnings for the period from February 1, 1949, to January 31, 1952, was prepared from the books and records of Winckler & Smith Citrus Products Company. The earnings or surplus as reflected on Exhibit BE at January 31, 1952, in the amount of $76,294.78, is analyzed on this Exhibit BF.

Proceeding from the original date subsequent to the reorganization to January 31, 1952, the amount of the surplus [2672] represents a black figure or a credit, when in reality it is made up of various adjustments which have been carried through the surplus account. It represents the accumulated loss for each month, and the total for the year, adjusted for the forgiveness at the time of the original bankruptcy, and adjusted for the write-up of the assets in the subsequent year, in April, 1951.

It shows the total gain on reorganization, it shows the total earnings from operations, and it shows the total appreciation, the cost of the recapitalization when the preferred stock and the common stock were issued after approval by the California Commission.

The statement reflects the original amount at January 31, 1949, of $215,548.05 as a deficit. This is the amount as reflected on the books, the original amount.

(Testimony of John A. Lynch.)

Q. That is the first figure under the first column "Surplus," is that correct?

A. That is correct. That is made up——

Q. In the next column you show the conditions down to January 31, 1950, is that correct?

A. That is correct. I start——

Q. The first thing under that January 31, 1950, column is that same $215,000 item, is that correct?

A. Well, the next column represents the adjustments of the analysis for that particular year, the year ended [2673] January 31, 1950, so you start with the opening deficit as reflected on the books prior to any transactions. That $215,548.05 deficit as reflected on the books represents the 1947 loss of $11,771.34 as reflected on Exhibit A-3. It represents the 1948 loss of $123,000 shown on Exhibits A-4 and 5. It represents the 1949 loss of $100,000, which is Exhibit 59. And also represents the net adjustments following the period where the surplus reserve of $5,000 was returned and the $15,000 disallowance of salaries by trustee was credited thereto.

Q. All right.

A. That comes to the $215,548.05 deficit.

Q. In the January 31, 1950, that is the opening deficit, isn't it?

A. That is the opening deficit at January 31, 1949.

Q. Yes. Now, you carry that forward into the column headed "January 31, 1950," and reading down that column show what circumstances were made to affect that balance, is that correct?

(Testimony of John A. Lynch.)

A. That shows the continuity of that account, that is correct.

Q. All right. Now, will you show us what affected the surplus deficit as of that year closing January 31, 1950, reading down that column.

A. At the first of the year, February 1st, or January [2674] 31st, '49, starting with a deficit of $215,548.05, the adjustment for the forgiveness of the debts in the first bankruptcy were reflected to show a gain arising from such discharge of the amount of $205,098.52, which was credited to the operating deficit account. Mr. Winckler was allowed $3,512.34 for reorganization expense in the trusteeship. That was handled through the surplus account.

Following the sale of the assets, the repurchase option was set up on the books for $1.00, and that was credited to surplus in the amount of $1.00.

The loss for the year ended January 31, 1950, was $91,220.20 and represents my computation of the loss for that year. It is made up of the amount of $121,000 profit, as shown on exhibit——

The Court: 61?

The Witness: 61.

(Continuing) ——adjusted for the $169,000 loss on the sale of assets, and adjusted for the $38,000 of forgiveness, which were handled through the surplus account.

I could have analyzed that and put those same amounts in here, and I would have come to the same answer, except for one adjustment.

We have adjusted depreciation for all the periods

(Testimony of John A. Lynch.)

in accordance with the rates as set up by the company. The amount is not too material throughout. I think the greatest amount [2675] was $4,000 in any one year.

But that slight discrepancy between this one hundred five as reflected on our sheets and one hundred three as reflected on Exhibit 61 is due entirely to the depreciation. Exhibit 61 shows $103,000 deficit, and our exhibit shows $105,000. An adjustment of approximately fifteen, sixteen hundred dollars for depreciation.

Q. (By Mr. Strachan): The net effect of all of those transactions as reflected here in the year ended January 31, 1950, was to leave a deficit of a little over $105,000 at the end of that year, is that correct? A. That is correct.

Now, our classification of those items is reflected in the last four columns. The $205,000, which was the gain on the reorganization from forgiveness of the debts discharged were put into the gain on Reorganization column. The $3,512.34, which was the Winckler expense on reorganization, was put in that Gain on Reorganization column. The recording of the option of $1.00 was put in that column. The loss of $91,220.20, loss from the operations, was put over in the Earnings from Operations column, together with the deficit of $215,000, which was accumulated earnings from the inception of the corporation.

Q. Will you proceed and show the changes in this deficit figure occurring in the year ending Jan-

(Testimony of John A. Lynch.)

uary 31, 1951? [2676] You carried that $105,000 deficit up to the head of the next column; is that correct?

A. That is correct. The deficit at the end of one year becomes the opening deficit of the preceding year. The opening deficit of the preceding year or the year ended January 31, 1951, was $105,181.07. To that we have added our computation of loss, which was $14,203.20.

That can be reconciled to Exhibit 63 by taking the $40,000 as shown on that exhibit and deducting therefrom——

The Court: $40,000 profit.

The Witness: $40,000 profit. I am sorry.

(Continuing) ——and deducting therefrom the $50,000 of deferred promotion expense and the unabsorbed factory expense, and the advances to employees, to show a true loss for the year of $14,203.20.

Q. (By Mr. Strachan): So that your footing of that column comes to $119,000 deficit, is that correct?

A. That is correct. And that same item is carried, again, over to the column marked Earnings from Operations, and is shown in red $14,203.20.

Q. All right. Now, will you follow that column down and show how that deficit was converted into an apparent surplus by the end of the year?

A. The earnings or deficit, as shown on the last line of $119,384.27, deficit January 31, 1951, was carried [2677] forward as the opening deficit of the

(Testimony of John A. Lynch.)

subsequent year. To that adjustment the corporation made a $439,546.66 credit by writing up the assets, thus wiping out any deficit.

That item as shown, $439,000, was transferred by us into the column marked Appreciation.

The next amount is the cost of discount on the preferred stock which was sold subsequent to the approval of the State. That amount, $5,105.63, was charged by the company to surplus. We have reflected it therein, but classified it over as the cost of the recapitalization over in the last column.

The next item represents selling expense of additional preferred stock, and was likewise reflected in the surplus account.

That item, likewise, is shown by us as still in surplus, but classified by us as a cost of recapitalization.

The next item reflects a charge by the company to surplus of $74,412.78, which represents the amount by which the par value of the shares was deficient when measured against $240,000 previously carried as capital stock.

The corporation transferred out of this write-up of $439,000, $74,000 and put it in the capital stock account, to bring the capital stock up to $315,110 as reflected on Exhibit BE.

The next item represents the actual operating loss for the year January 31, 1952, as computed by us. It represents [2678] the adjustment for the depreciation that I previously commented on, and it rep-

(Testimony of John A. Lynch.)

resents the reduction from the loss as shown on Exhibit 65 of $184,000 for the item of $50,000, which we previously had classified as being expense of the prior year. Thus it reduced the $184,000 to $136,000 approximately, for the year.

We made the additional charge of $21,000 for the pro rata write-off of that appreciation, which was in conformity with the books of account of the corporation throughout the year until January 31, 1952, when the company reversed the consistent practice.

Q. Now, the next column entitled Gain on Reorganization simply brings over and puts in a single column the items that fall in that classification?

A. That classifies in summary total—it is simply the addition of the items that were classified into the Gain on Reorganization. The total gain on the reorganization is reflected as being $201,587.18.

Q. In the next, the vertical column entitled Earnings from Operations, starts off with the initial surplus deficit, and then shows the adjustments made in that due to the income or loss statements?

A. That shows the total of $478,397.60 loss from the date of inception of that corporation from operations.

Q. And then the Appreciation column is, likewise, a [2679] recapitulation of that one item that is carried across the page?

A. That is right. And the final column shows the cost of recaptialization.

(Testimony of John A. Lynch.)

Q. Getting back to the first column, that is your summary of all of the items shown in a single columnar form, it is a recapitulation of the three-year period bringing together and netting all of the items referred to?

A. Well, it shows that the only profit that this corporation ever had was from the first bankruptcy and from the write-up of the assets. The rest were all losses. [2680]

* * *

Q. (By Mr. Strachan): Mr. Lynch, have you taken from the books of account of the company the profit or loss for the first six months of the fiscal year commencing February 1, 1951, for each month, the first six months? A. I have.

Q. Did you take those off as they appeared on the books, or did you make any adjustment?

A. I made no adjustments.

Q. Will you tell us what the profit or loss statement at the end of the first month, that is the end of February, 1951, was?

A. The loss for the month was $3,473.20, as shown by the books.

The Court: This is 1951, now, we have gone into?

Mr. Strachan: Yes. [2681]

The Court: All right.

Q. (By Mr. Strachan: What was the loss at the end of March, 1951?

A. The loss was $21,070.83.

Q. What was the loss at the end of April, 1951?

(Testimony of John A. Lynch.)

A. At the end of April, 1951, the loss was $33,066.85.

Q. What was the loss at the end of May, 1951?

A. The loss at the end of May was $49,895.27.

Q. What was the loss at the end of June, 1951?

A. At the end of June, 1951, the loss was $61,997.

Q. And at the end of July, the sixth month of the fiscal year, what was the loss?

A. The loss was $148,307.86, as reflected on Exhibit 64.

Mr. Strachan: I would like to have Exhibit BH.

The Court: I am not going to permit BH to be passed to the jury, but you may identify the exhibit. I mean by that I am limiting you to summaries on the same basis the plaintiff has used the summaries. You can identify the exhibit and see where we go.

Q. (By Mr. Strachan): I show you the document marked BH and ask you if that was prepared by you and under your direction and supervision?

A. It was.

Q. That is entitled "Cost to Corporation of Lease and Repurchase Agreement with Stockholders." Will you tell us [2682] whether the document was prepared from the books and records of account of the Winckler-Smith Company submitted to you? A. It was.

Q. Will you tell us in what manner the exhibit was prepared?

A. The accumulation of rentals for the property——

(Testimony of John A. Lynch.)

Mr. Dixon: Now, if the Court please, I think at this point I want to enter an objection to any questioning along the lines of anything referred to or contained in Exhibit BH as being wholly irrelevant and immaterial to any of the issues of this lawsuit, and not tending to prove or disprove any of the issues of this lawsuit. I think there is no justification for proceeding further with this question or this line of questioning.

The Court: It is immaterial on what ground?

Mr. Dixon: All of these items are reflected in the balance sheets and operating statements that are already before the jury and in evidence, and it seems to me it is wholly immaterial as to what the rental was that was paid. We are willing to stipulate, if it is important, it was $1,800 a month by the lease that is referred to, but I don't see as it has anything whatever to do with the matter unless counsel is going to question those items as being improper items. This is an accountant.

The Court: Does this exhibit show in each of the items [2683] matters that you took from the books and records of the company?

The Witness: Yes, your Honor.

The Court: I will sustain the objection on various grounds, some of which pertain to discussions we had out of the presence of the jury. First of all it is argumentative. They are matters which appear in the record which you can argue to the jury.

The idea of bringing in a flood of exhibits to argue each point, I am not going to permit.

(Testimony of John A. Lynch.)

On the second ground, that would be a recording of the testimony of the witness.

On the further ground that the exhibits were made up and not previously exhibited to counsel pursuant to directions of this Court, except on the evening before, and upon the ground that the material issue in question is the status of this corporation in the calendar year 1951 or its fiscal year ended January 31, 1952, and that segregation of matters which happened in connection with the organization may be argued insofar as it reflects the status of the corporation in 1951, but is not in itself an issue in the case.

Mr. Strachan: Your Honor, as to some of those matters, I want to say first that this document was delivered to counsel, I believe on Tuesday, so it can't come as any surprise.

In the second place, I don't think anywhere in this [2684] record was there brought together a showing as to what sale and lease-back cost the corporation and how it was responsible for an enormous depletion of the assets of the corporation.

The Court: I am limiting myself now to this exhibit. I am not ruling on some other questions you might ask. We discussed yesterday at great length the question of this great number of exhibits. It will be my ruling as far as this exhibit is concerned.

You may inquire of the witness.

Mr. Strachan: To get the lawyers' work out of the way, I will offer the exhibit in evidence.

(Testimony of John A. Lynch.)

Mr. Dixon: Objected to on the grounds previously stated.

The Court: Sustained on the grounds stated.

Q. (By Mr. Strachan): Mr. Lynch, did you make a determination from the books and records of the corporation of what the various items of cost to the corporation were of the lease-back from the stockholders of the plant after they had purchased it as a part of the first bankruptcy reorganization?

A. Yes, I did.

Q. Will you state what the cost to the corporation was in direct cash rentals?

Mr. Dixon: Now, if the Court please, I again wish to object and I must object. Does counsel expect by this witness to subsequently go into—is he trying to lay the foundation to show that the rental was unreasonable? Then we will stipulate [2685] as to what the rental was, but certainly this witness has only examined the books and, therefore, cannot express any opinion one way or the other as to whether this rental was reasonable or unreasonable, or enough or not enough, and unless counsel expects to proceed further, and even then I would have to object on the grounds that it was not tending to prove any issue in this case. I renew my objection, your Honor.

The Court: Well, it is a borderline case. I am going to overrule the objection. It is subject to the argument that it is argumentative, that these are matters that you could argue to the jury insofar as you related them to the condition of the corporation

(Testimony of John A. Lynch.)

in 1951, but solely for that reason. We are not going to try ipso facto the condition of the corporation at other times. We are concerned with what was its condition in the year that the damage is claimed. Its materiality on these questions, therefore, is only insofar as it relates to 1951.

Mr. Strachan: I would agree with that.

The Court: All right.

Mr. Dixon: I must confess I am still at a loss to know how this evidence can in any respect be said to be relevant to any issue in this lawsuit unless counsel expects to show, as I suggested, that the rental was unreasonable. Otherwise we admit, the record is clear, and there is no dispute about [2686] it. If we want the lease in evidence, we will be glad to put that in, but I think we have enough in the record at this time without going off on this issue.

I still renew my objection, your Honor, on the ground that I cannot see how this line of questioning can in any way bear upon any of the issues of this lawsuit as to what the rent was or who got it, unless he expects to claim it was unreasonable. If he does that, if counsel expects to do that, then we have to go into the issue by expert testimony as to whether the rental paid was or was not reasonable. Where does it lead us?

The Court: I am going to reverse myself on this. The Court has to put some limitations on how long a trial can go. The issue in this case is what was this corporation in 1951? You will not be foreclosed

(Testimony of John A. Lynch.)

from showing what assets it had, what liabilities it had in 1951, but here is something that concerns things that grew out of the reorganization and its bearing is remote, if any.

Mr. Strachan: I don't agree with that, your Honor, for this reason, that these three stockholders——

The Court: Let me finish.

Mr. Strachan: Yes, sir.

The Court: Because what happened before by the natural laws of causation brought about the condition which existed in 1951 and, therefore, the ultimate question is what was [2687] the condition in 1951. We can spend months here in the trial of this case going back into and exploring a lot of these other things, when the question the jury wants answered, and I won't refer to my analogy, is what was this corporation's condition in 1951?

Now, that can be shown by what its assets and its liabilities were, and so forth. What went on in the reorganization is reflected in its condition in 1951, and this doesn't take us along the road to resolving the issue.

Mr. Strachan: Your Honor, as to what happened in 1951, I would like to illustrate the importance of this in my view. This lease-back arrangement was continued in effect until, I believe, April of 1951. In April, 1951, as the earnings record just read shows, which was put into evidence by Mr. Lynch, the corporation was sustaining a whole series of losses. Then in that precarious financial con-

(Testimony of John A. Lynch.)

dition, the corporation undertakes to exercise its option of repurchase and in that way diverts substantial assets of the corporation to its stockholders when it is on the brink of bankruptcy. [2688]

Mr. Dixon: Well, now, I object to that statement, your Honor, and ask that it be stricken.

The Court: Statements of counsel are not evidence, neither yours, nor Mr. Strachan's.

Which these questions have nothing to do with. You will be permitted to go into the question of reorganization, when it was done. That has nothing to do with this line of questions that you are going into now.

Mr. Strachan: Everything that I propose to go into on this subject happened subsequent to reorganization. The voluntary payment of rent to the stockholders who bought the property. They continued to pay rent down until the company is virtually insolvent, and then they have the corporation exercise the option to repurchase the property for $200,000.

Mr. Dixon: Just a moment, your Honor.

The Court: Are you arguing your case to the jury now?

Mr. Strachan: No.

The Court: Are we ready to rest and have the arguments, Mr. Strachan?

Mr. Strachan: No, sir.

The Court: Then let's stop the argument, and we will have the argument at the proper time, or out of the presence of the jury.

(Testimony of John A. Lynch.)

The objection is sustained. [2689]

Mr. Strachan: I shall make an offer at some later time.

The Court: All right.

Mr. Strachan: I would like to have Exhibit BI.

Q. (By Mr. Strachan): Mr. Lynch, did you make a study from the books and records of account of the corporation of the amounts paid or withdrawn by Mr. Winckler from the corporation on account of salary, bonuses, forgiveness of indebtedness, and expenses, for the three fiscal years subsequent to the first bankruptcy reorganization?

Mr. Dixon: If the Court please, I think this is the proper time for me to enter my objection to any questioning along the line that counsel has just put to this witness, not only concerning this exhibit, but to try and lay any foundation for its introduction, on the ground that, No. 1, the exhibit to which he is obviously referring, is argumentative, contains material that is wholly irrelevant and immaterial to the issues of this lawsuit, and in no way tends to prove or disprove any of the issues of this case.

I have no objection, even, to stipulating what Mr. Winckler's salary was, if counsel wants that before this jury.

I think it was earned.

But to try and inject——

The Court: Now, don't you make a speech, either.

Mr. Dixon: I am sorry, your Honor. [2690]

(Testimony of John A. Lynch.)

I make my objection on the same grounds previously made.

Mr. Strachan: Mr. Dixon, will you also stipulate as to the amount of forgiveness of indebtedness, the allowances, and the totals withdrawn?

The Court: Mr. Strachan, we have been all over the forgiveness, it has already been gone into.

The objection is partly overruled and partly sustained. You may inquire from the witness as to what the salaries and withdrawals of Mr. Winckler were in the year 1951. That is year ending January 31, 1952.

I am going to try and keep you, if I can, to the issues of that year.

As to what went on in past years, they will be reflected by the statements of assets and liabilities for the year '51.

You have reconstructed them, and the plaintiff has its view of it.

Mr. Strachan: Your Honor, in my view, dissipation of assets, abstractions of assets in prior years, are just as important as those in later years, because——

The Court: The jury will disregard the remarks of counsel about abstractions of assets or dissipation of assets.

Mr. Dixon: "Dissipation" was the term he used, your Honor. I object to it.

The Court: If your theory was correct, Mr. Strachan, we [2691] could go back and prove every

(Testimony of John A. Lynch.)

postage stamp that the corporation spent in prior years as proof of what its condition was in 1951.

Now, that isn't, in my opinion, the way to prove its condition in 1951.

It has a balance sheet of assets and liabilities. You can go through and work on that as long as you want to.

It says, "I had (A) a piece of property," or "I had (C) an automobile"; if you want to show the automobile was junk and the piece of ground was in a swamp, you can. But you don't prove that by going back and showing every expenditure of postage stamps spent by this corporation, whether spent soundly or unsoundly in the years preceding.

So the objection will be sustained to the use of BI. You may inquire as to salary or allowances to Mr. Winckler in the year '51.

Mr. Strachan: I can't go into the salary and allowances or withdrawals by him in prior years, is that your Honor's ruling?

The Court: That is my ruling. At least not in the form of this exhibit.

You have already covered the forgiveness of debts, which you have got included in here.

Mr. Dixon: If the Court please, I rise to renew my objection, even with reference to any question concerning the [2692] salary of any of the executives of this company. The jury has in the balance sheet, in Plaintiff's Exhibit 65, a statement of the full amounts paid for executives' salaries during that year, and the administrative expenses. I think

(Testimony of John A. Lynch.)

it has already been testified to, in part, as to the number of employees that were employed, and so on.

The Court: Overruled.

Mr. Dixon: The reason for my objection—all right.

Q. (By Mr. Strachan): Mr. Lynch, was Exhibit BI prepared by you and under your direction and supervision from the books and records of account? A. It was.

Mr. Strachan: I will offer it in evidence.

Mr. Dixon. Objection.

The Court: On the same grounds?

Mr. Dixon: Yes, sir, on the grounds previously stated.

The Court: The objection is sustained.

We have had so much discussion about these.

It is sustained on various grounds. It is argumentative, it covers a matter of debt forgiveness already covered in the record, which makes this cumulative. It is an attempt to prove by expenditures in prior years what the condition of a corporation was in the year in question, and various other grounds heretofore stated by the objections by counsel to this and similar exhibits. [2693]

Mr. Strachan: In order that I may proceed without overstepping what your Honor intends to be the scope of my examination, I would like to have a brief talk with you and Mr. Dixon at the bench, if I may.

The Court: All right. Approach the bench.

(Testimony of John A. Lynch.)

(The following proceedings were had at the bench outside the hearing of the jury:)

Mr. Strachan: What I wanted to know is whether I can go into salaries for each year.

The Court: What will that prove?

I am going to let you go into the year '51.

Mr. Strachan: On my theory of the case, your Honor, it is very important to show why the corporation was in its extreme financial condition before the Valencia season of 1951, and in that connection I wanted to show what the lessors, what the lessor-stockholders took out of the corporation in the three-year period, I want to show what Mr. Winckler took out, because that has a very direct bearing.

The Court: Would it make any difference who took it out? What difference does it make who took it out? It is reflected in the books of the corporation as it went into the year 1951.

Mr. Dixon: So that I may again renew my objection about any questioning at all going into the field or question of what Mr. Winckler or any other employee or executive of this [2694] company got the record is not in dispute here, and it is in the balance sheets, that for executive salaries, and so on, those amounts were paid. I don't want to have to be in the position, as I would have to be if counsel were to proceed with this question, to have to justify what Mr. Winckler did, by putting him on the stand and saying, "How many hours did you

(Testimony of John A. Lynch.)

work, what were the duties, and so on, as president of this company?"

This is not a stockholder suit, this is not a suit by creditors; it is an antitrust suit.

The facts here are clearly in evidence for the jury that the executives' salaries paid during the years in question for executives were X dollars. Maybe that is too high from their point of view, but are we to have the jury pass upon that question, or have them hear any evidence on it?

It is just as immaterial, in my judgment, as to what Mr. Armstrong was getting, comparatively speaking.

I can't see the relevancy of it.

The Court: The only relevancy is a contention that defendants might make that the plaintiff suffered, not damage from the defendants, but they suffered damage because they paid too high a salary in 1951.

That issue could be argued—I don't think it will be—that that is what broke the company. But what they paid him in prior years has nothing to do with what the condition [2695] was in '51, any more than what they spent on every other single item that went into the business of the corporation.

If we were going to go into that, we would be here forever showing what they paid out and what they received in prior years, as trying to show what they had in 1951.

I am not limiting you as to what you want to show as to their condition of assets and liabilities

(Testimony of John A. Lynch.)

in 1951, but I am not going to have you go back and prove item by item other matters, expenditures in other years, which by a process of reasoning would indicate what the result would be or the financial structure of the company was in 1951.

I might say this: If this case isn't straightened out, as far as the issues are concerned, I may exercise a prerogative that judges have of pointing up the issues to the jury.

I have done that very, very rarely. I have almost never done it, but I have done it. If you don't get down to the issues of the case, I intend to exercise that prerogative.

Mr. Strachan: May I say something, your Honor?

The Court: Yes, sir.

Mr. Strachan: I don't intend to stay here long proving up each postage stamp, as your Honor indicated to the jury that possibly I did. I intend to show, and I could show, if permitted, within a matter of five minutes, the facts that I think are important in showing that it was improvident management of the corporation which diverted assets of the corporation [2696] to the management, Mr. Winckler, and to its other stockholders, in the amount of some nearly $250,000 over a two and a half year period after the first reorganization that brought about the financial collapse and was in large part, if not entirely, responsible for the failure in business.

As long as we are here I will say that I would

(Testimony of John A. Lynch.)

offer to prove, if allowed to proceed with the witness' testimony, as distinguished from the exhibits, each of the amounts shown as payments to the lessor-stockholders, as shown on Exhibit—was it BH?

The Court: B what?

Mr. Strachan: I think it is BH, your Honor.

(Continuing) ——as shown on Exhibit BH, and each of the payments shown on Exhibit BI, as having been made to Mr. Winckler, and would show those were taken directly from the books and records of account of the corporation.

The Court: How many of these other things do you have that you want to go into?

Mr. Strachan: Just these two.

Mr. Dixon: Just so the record may again show the position of the plaintiff in this matter. We submit that any attack by this witness, or accountant, on the balance sheets, as such, of the plaintiff, or any of its evidence, or any showing that the books or records of this company are fraudulent [2697] or incorrect, might be admissible, so far as they would apply to the contentions of the plaintiff, as demonstrated by the exhibits here and its balance sheets and its income account; but I object to the introduction of any evidence by these defendants which raises collateral issues, such as the question of whether the salary of the manager or any other employee was proper or improper, or whether the rent was proper or improper as being wholly immaterial, because the balance sheet, which is al-

(Testimony of John A. Lynch.)

ready in evidence, shows the total amounts paid for those items, paid out for those items.

The Court: Just a minute.

On Exhibit BH, this cash payment on repurchases is already in evidence, is that right?

Mr. Strachan: Yes.

The Court: $132,000 for preferred stock is already in evidence?

Mr. Strachan: That's right.

The Court: Rentals, query.

These other two—the $50,000 received is in evidence?

Mr. Strachan: Yes.

The Court: Now, with the exception of the rental item the rest of this is purely argumentative. Even if it is admissible remotely on what is the status of the company in '51, it is still argumentative, something that you could argue to the jury if you want to, but you don't use a witness [2698] like this to argue your case to the jury.

As to the item of rent, how many months' period is that? Does the witness know, can he testify?

Mr. Strachan: It was eighteen hundred—it must be 20 and a fraction months.

Mr. Dixon: The lease is the best evidence.

Mr. Strachan: The lease isn't evidence as to what was paid, Mr. Dixon. Let's talk sense.

Mr. Dixon: Now, you know that was paid, counsel.

The Court: Just a moment, now.

As to the salary matter on BI, you may go into

(Testimony of John A. Lynch.)

the salary for the year '51, and I will think about it over the noon hour as to the other two years.

On BF I will let you go into the rental matter, how much was paid for the property during the time it was rented.

Mr. Strachan: As to the other matters in the offer, the objection is sustained?

The Court: Yes. I have already indicated you can bring out the salary and payments to Winckler during the year ending January 31, 1952.

Mr. Dixon: I don't even know what those were from the books, and I certainly would object to that, because we will have to go in and show, by rebuttal testimony, that Mr. Winckler spent those moneys for travel, or whatever it was. I frankly don't know. [2699]

The Court: Your accountant can find out.

Mr. Strachan: Your Honor, in my view, the limitation as to the last year of operation with respect to salary emasculates the whole point that I am making that there was improvident management continuously during the period subsequent to the first reorganization.

The Court: Is it improvident management to pay a man a salary to manage a corporation?

Mr. Strachan: It seems to me, when a man takes out $102,000 for operating a business that lost consistently——

The Court: Your Exhibit BI is, I think, erroneous, because of the fact of what is included in there.

(Testimony of John A. Lynch.)

There was a forgiveness of the corporation in that amount, but that is a long way from saying that Winckler got all of the $38,000, as far as the record in this case is concerned.

Mr. Dixon: I just wish to add this comment to the record: That I have never seen, in all of my 28 years of trying lawsuits, a better effort on the part of counsel, I should say this, to confuse issues, as that I see being directed here.

The Court: Let's go ahead. [2700]

(The following proceedings were had in the hearing and presence of the jury:)

Q. (By Mr. Strachan): Mr. Lynch, what was the amount of cash rentals paid under the lease-back arrangement between the time of the reorganization proceedings in 1949 and the repurchase of fixed assets by the corporation in the spring of 1951?

A. The direct cash rentals were $37,000.

The Court: Is that on some monthly basis?

The Witness: That is correct, your Honor.

The Court: What was the rate?

The Witness: The rate was $1,500 a month, 10 months in the first year, $15,000; and the second year was 12 full months; and then it was sold in the following year, so there is only a balance reflected there.

The Court: All right.

Q. (By Mr. Strachan): Mr. Lynch, have you

(Testimony of John A. Lynch.)

examined Plaintiff's Exhibit No. 39, which is the prospectus? A. I have.

Q. With respect to the statement contained therein that the earnings of the business from the partnership, its inception in the partnership down through the year ended January 31, 1951, amounted to over a half million dollars, have you made any examination of the books and records to determine whether that is a correct statement? [2701]

A. I have.

Q. Now, with respect to the period of the partnership operation that is included therein, I believe it is stated that the earnings of the partnership period amounted to some $95,000. Did you examine the books and records to determine whether that is a correct or an incorrect statement?

A. I did not examine the books and records, but reference to A-1 exhibit in this courtroom reflects that the partnership made $38,897.22 for the period of its operations from March 10, 1945, to January 31, 1946. The item on the prospectus stopped at December 31 and reflects the profit as being $95,377.64.

The Court: Mr. Witness, again, so that we will not be confused, in giving these figures are you giving them as they appear on the books or as you as a CPA would calculate them?

The Witness: No, your Honor, I did not have access to the books of the partnership. All I had was access to the Exhibit A-1, which is in evidence.

The Court: All right. Go ahead.

Q. (By Mr. Strachan): Now, the prospectus

(Testimony of John A. Lynch.)

December 31, 1945, were ninety-five thousand some odd dollars.

No. 2, the earnings before taxes for the company after its incorporation for the period ending July 31, 1947, were 197,000 some odd dollars.

No. 3, the earnings for the 1947 packing season covering the operating period from August 1, 1947, to October 31, 1947, were 54,000 some odd dollars.

No. 4, for the 1948-49 years, which was the date of reorganization, earnings were over $50,000.

5. For the fiscal year ending January 31, 1950, the earnings amounted to 121,000.

6. For the fiscal year ending January 1, 1951, the earnings amounted to $40,845.

So now you know what was said in the prospectus and Mr. [2707] Strachan's questions are related to those quotes. He can frame his questions in such a way he won't have to repeat that whole series. I don't know whether earnings is meant to mean the same as profit or not, but all we want to do is when the question is asked to know what we are particularly referring to when it is asked of a witness. [2708]

* * *

(The following proceedings were had outside the hearing and presence of the jury:)

The Court: The record will show the jury absent.

With reference to BI, which I sustained objection to on salary, I have given some thought to the mat-

ter over the noon hour and I am going to permit the witness to be interrogated as to the salary and what he terms allowances and bonuses paid to Winckler in the three years in question. The forgiven debt has already been covered.

This opens up in a way collateral issues, but it doesn't open too wide a one in that the records of the company in evidence may not show what was salary and what was bonus and what was allowances. If there is any question about the allowances, it can be covered on cross in a very short period of time. But I am not going to admit BI.

Mr. Strachan: You have already excluded it in your announcement.

The Court: Yes.

Mr. Strachan: You referred to the scope of the testimony that may be given on the subject.

The Court: That's right. As to the year 1951, I think it is clearly proper. As to the two succeeding years it is remotely proper in that the plaintiff has relied on the [2709] financial statements of those years, and if these are figures that come out of those financial statements, they could be shown. The ultimate question is still: What was the plaintiff's condition in the year 1951? I suppose a subsidiary question is: Was the failure of the company or its loss in 1951 due to bad management or due to the allegations of the complaint, or a combination of both?

To the extent that you can make anything out of the amount of salary paid to the man, I suppose you are entitled to do it. It doesn't impress me very

(Testimony of John A. Lynch.)

states that for the period from February 1, 1946, to July 31, 1947, there was a profit of some $197,000. Have you made an analysis of that? [2702]

A. I have.

Q. Will you tell us what analysis you made and what the result thereof was?

A. I reviewed the statements of the corporation, which are Exhibit A-3, which reflects the first year of operations subsequent to the incorporation. That Exhibit A-3 shows a loss of $11,771.34, which is the company's certified statement.

I inspected the following year's exhibit, which is A-4 which is the company's audited statement, and it reflects a loss thereon of $72,221.28 for the ensuing year, exclusive of an approximately $50,000 inventory adjustment, which brings me to a total from incorporation through the period embraced here of a loss of approximately $135,000, of which thirty-five or forty thousand could be applicable to the six months subsequent to this statement, so that the statements themselves reflect a loss of approximately 100,000, and item 2 of the prospectus reflects the profit of $197,169.51 for the period from the inception of the corporation to July 31, 1947.

Q. Now, what is the stated profit according to the prospectus for the period from February 1, 1946, through the year ended January 31, 1948?

A. Would you repeat that?

(Question read.) [2703]

A. The prospectus for the period from the in-

(Testimony of John A. Lynch.)

ception of the corporation, February 1, 1946, through August 31, 1947, which is three months short of two fiscal years, reflects a profit of $252,107.50.

Q. For the two full fiscal years, what do the books show? A. The reference to the——

Mr. Dixon: Would you add, "according to your opinion," counsel, please?

Q. (By Mr. Strachan): According to your examination and according to correct accounting procedure.

A. The books would show $135,341.74 deficit through January 31, 1948, three months subsequent to the reflection of a profit of $252,107.50.

Q. According to the prospectus, Plaintiff's Exhibit 39, there appears to be, there is stated to have been a profit of $50,000. Have you compared that stated profit with the profit or loss stated in Plaintiff's Exhibit 59? A. I have.

Q. What is it?

A. Exhibit 59 reflects $100,503.15 loss for the year ended January 31, 1949, as contrasted to the item 4 in the prospectus, which states for the 1948-49 year, which was the year of reorganization, earnings were over $50,000.

Q. With respect to the year ended January 31, 1950, [2704] the prospectus shows earnings of $121,360. How does that compare with the profit or loss according to the books as you found them?

The Court: According to his computation or how he found it listed?

(Testimony of John A. Lynch.)

Q. (By Mr. Strachan): As you determined it——

The Court: Now, you are going back and forth in these questions. I don't know whether the jury is following.

Mr. Strachan: I don't intend to. I intend to be consistent.

The Court: I don't say that you intend to, but you know that in certain instances he has given certain figures which appear on the books and in other instances he has given the figures which he computed from something in the books.

Mr. Strachan: I will put the question again.

Q. For the year ended January 31, 1950, the prospectus states there was a profit of $121,360. From your examination of the books, applying the principles of accounting that you regard as correct, what was the gain or loss during that year?

Mr. Dixon: Just a moment, your Honor. I want to object at this time because counsel has made a misstatement. The prospectus clearly reads, "For the fiscal year ending January 31, 1950, the earnings amounted to," and counsel uses the word profit. [2705]

Mr. Strachan: You mean the earnings before expenses?

Mr. Dixon: My objection, your Honor, I have no objection to anything that is clearly stated there, but when counsel uses the word profit or loss or depreciation, according to an accountant it may

(Testimony of John A. Lynch.)

have 50 different meanings, and that is the reason for my objection.

The Court: Objection sustained to this extent. You should correctly quote the prospectus when you ask the question. If the prospectus says earnings, it shouldn't be quoted as profit or loss.

Mr. Strachan: Mr. Stark has just called my attention to the fact that this tabulation in the prospectus to which I am referring says, "Mr. Hodge reported the following profit figures."

Those are what I am talking about.

The Court: Let's see the prospectus.

Mr. Dixon: Let's read the whole thing, your Honor. It is in evidence.

The Court: Wait just a minute, now. Let me look it over.

Well, we are going to adjourn for lunch, but we will not leave this with any note of mystery. At the top of page 3 appears the following statement:

"Disregarding this non-recurring inventory loss, which was absorbed by the corporation, over [2706] a period of three years, the corporation auditors, Hodge & Company, reported the following profit figures for the business."

Then appear six subdivisions. No. 1 starts out:

The earnings of Winckler & Smith, and so forth. Well, that's the partnership.

The earnings of Winckler & Smith Citrus Products Co., a partnership, as predecessors to the corporation from March 10, 1945, date of inception, to

much, but that is not the point. It might impress the jury. They might think a corporation that sold over a million dollars a year in goods is wrong in paying a president twelve to fourteen thousand dollars. So get the jury down.

Mr. Strachan: Your Honor, before we get the jury in, I don't want to have a technical discussion in their presence, but you have indicated if there were an offer of BJ, having laid a foundation by the witness Lynch, you would exclude the exhibit as an exhibit.

The Court: Right. BJ?

Mr. Strachan: Yes, sir.

The Court: Yes. [2710]

Mr. Strachan: Then may we construe the record made as if that had been formally offered and excluded?

The Court: The record will so show, it will be excluded on the ground that—I assume the record shows you offered it in evidence and that the witness testified to the various figures on it, and where he got them, and that the objection is made upon the various grounds stated, and it will be excluded, particularly on the ground that it is merely a recording of the testimony of the witness.

And in order to be evenhanded in it, I am going to permit you to use five exhibits—you apparently wanted to make your rebuttal to the financial statements, and of course you will have a chance to have your rebuttal summary on the TreeSweet and Silzle contracts, and your rebuttal showing on the computation matter; however, it seems to me presently

that you have three in here, you have AY, and you have BS and BT, and I haven't looked those over too carefully now to know how the thing should be handled, but where the argument grew out of a long cross-examination, and then finally the Court saying he is going to stop the cross-examination and suggest that it be reduced to writing so you can study it, and at the same time give the other side a chance to reduce theirs to writing, then it seems to me there ought to be the two statements, one the plaintiff relies on and another one which is the defendants' computation based on that cross. [2711]

That is the logic behind the rulings I am making, if you follow me.

* * *

The Court: Put the heading on it.

I still think you should discuss the headings on these various documents so there won't be any confusion of plaintiff's documents, which say at the top "Winckler & Smith," [2712] and plaintiff's testimony showed that they were financial statements of the company. And now you have got at the top of yours, "Winckler & Smith." I don't think in a small case the jury would be misled, because they could remember the testimony; but I think the jury ought to know whether the document is a financial statement that came out of the books of the company or whether it is an adjusted statement pursuant to the testimony of a witness, or whether it is a summary statement like BB was. I think that ought to be done for the reason that most of these have at the top "Winckler & Smith,"

and it is subject to the inference that all of these were just picked up out of the books somewhere.

Mr. Strachan: We don't want it to be misleading, if it would be in the present form. Does your Honor have any suggestion to make as to how it should be done? Would stamping these "Testimony of Witness Lynch," or something like that be satisfactory?

The Court: Offhand, I thought BB should say something like, "Excerpts from Winckler & Smith's financial statements." BB was three or four years put on one sheet and was parts. My suggestion offhand would be that BC, BD, and BF, if I understand correctly the testimony of the witness, they were adjusted statements or statements where all the facts from which he drew his conclusions he found in the books, but then he made adjustments to arrive at another statement. [2713]

Mr. Strachan: I would dislike to be required to brand ours "adjustments" because, after all, Hodge's were adjustments, too. He puts a journal entry through to make a change in the books, and that is an adjustment. Our fellow reverses the journal entries to leave the books stand as they were before that.

The Court: That is true, but all of Hodge's statements were made before this lawsuit came up, although you could argue that the last one was not, but you would have to disbelieve Hodge on that score. Certainly the ones in the year before, no one contemplated that this suit was going to be here. You have a different situation. You are taking

statements as they then appeared on the books. True, adjustments are always made in closing the books. But what you have are reconstructed statements as your expert thinks they should be constructed.

Mr. Strachan: Well, the only difference is that Mr. Hodge sat down and changed the books before, and we sat down and reversed the entries later, as I see it.

I wouldn't want to put any designation on my exhibits that indicated that they were inferior to Hodge's statements.

Mr. Dixon: Did you say, counsel, he changed the books?

Mr. Strachan: He reversed the entries. They charge them to expense, and he set up that expense as an asset for the next year. [2714]

The Court: Maybe you could use a phrase something like "computations by Lynch."

You gentlemen talk it over. [2715]

* * *

Mr. Strachan: May it please the Court, I have a witness who is planning to be out of town and I should like to have Mr. Lynch step aside, with the Court's permission, and put this witness on out of order.

The Court: You may.

Mr. Strachan: Mr. Swayne, please.

AMOS SWAYNE

called as a witness on behalf of the defendants, being first sworn, was examined and testified as follows:

The Clerk: Will you please state your name?

The Witness: Amos Swayne. A-m-o-s S-w-a-y-n-e.

Direct Examination

By Mr. Strachan:

Q. Mr. Swayne, where do you live?

A. 1060 West 17th Street, Santa Ana.

Q. In what business are you engaged?

A. Food canning.

Q. What is the name of your firm?

A. Case-Swayne Company, Incorporated.

Q. Are you one of the founders of that company?

A. I am. [2716]

Q. How long has that company been in business?

A. Since 1941.

Q. Prior to the establishment of the Case-Swayne Company business, had you had prior experience in the food canning industry?

A. I started in the food canning industry in 1931 in Northern California, working for a firm by the name of Schuckl, S-c-h-u-c-k-l, and Company, Incorporated.

Q. What was the nature of your work in that employment?

A. I was in the manufacturing end and it was fruit and vegetable canning.

(Testimony of Amos Swayne.)

Q. Did you continue in that employment until you established your own firm?

A. Yes, sir.

Q. Now, will you tell us briefly the scope of the business of Case-Swayne & Company? First, with regard to the products that it markets.

A. We pack canned fruits, berries, canned vegetable and fruit juices.

Q. Those are all canned at the plant located where? A. In Santa Ana.

Q. In what markets are your products distributed?

A. They were distributed throughout the United States, primarily on the West Coast.

Q. And under what brands or brand names do you distribute [2717] your products?

A. Approximately 70 per cent is distributed under our own brand, which is Case-Swayne.

Q. How long has Case-Swayne been engaged in the packing of citrus products?

A. I believe our first year in citrus products was 1945. It was either 1945 or 1946. I can't be too sure.

Q. Since that time you have continuously packed and sold citrus fruit products, is that correct? A. We have.

Q. What products in particular do you pack and market?

A. We pack only what is commonly known as single-strength citrus juices. We pack orange juice, grapefruit juice, a blend of orange and grapefruit,

(Testimony of Amos Swayne.)

a blend of orange and pineapple juice, and a blend of grapefruit and pineapple juice.

Q. Approximately what part of your total production is represented by these citrus fruits?

A. It will vary somewhat from year to year. On the average, I would say approximately 30 per cent.

Q. And what part of your citrus pack do you ordinarily produce and sell under your own name?

A. Well, generally on all items it would be 70 per cent. Now, whether that would be higher or lower on any one individual item I wouldn't be prepared to say at this time. [2718]

Q. And the remainder of approximately 30 per cent, then, is labeled under brand names of other people in the citrus industry, is that correct?

A. That is correct.

Q. So-called private brand merchandise?

A. Private buyer's label.

Q. Can you tell us whether in general the price at which your citrus products are sold to the trade is above or below the price of, say TreeSweet or Exchange Orange?

A. Generally our prices are lower than TreeSweet and/or Exchange Orange.

Q. Could you, for the purpose of illustration, tell us approximately how much lower they are on a case of 12/46's?

A. That will vary somewhat from year to year. It is our intention, if it is possible, to maintain a

(Testimony of Amos Swayne.)

differential of in the neighborhood of ,15 cents a case.

Q. When you are packing citrus products, do you ordinarily pack so as to maintain an inventory of those citrus products, or do you pack only against firm orders?

A. We attempt to maintain an inventory.

Q. Will you explain why it is in your business you pack for inventory?

A. In view of the fact that the dominant portion of our pack is under own own label, controlled label, we feel it is necessary, if at all possible, to maintain stocks 12 [2719] months of the year in order to maintain our position on the grocers' shelves.

Q. And to maintain before the buying public the products which you offer under your own trade name? A. That is correct.

Q. Now, in addition to processing and packing for your own account, has Case-Swayne & Company ever made an arrangement with others to process and pack for them? A. Yes, we have.

Q. In 1950, did you enter into an arrangement with Exchange Orange Products for the processing and the packing of orange products?

A. We did.

Q. Will you tell us how that arrangement was made?

A. It was made purely by telephone, in other words, a very small quantity involved, actually, and Mr. Finley, I am sure it was Mr. Finley who contacted us, asked us if we would pack so many cases

(Testimony of Amos Swayne.)

of blended orange and grapefruit juice for them for their label for their account, and we did.

Q. On that transaction they furnished the fruit and the cans and the cartons and labels, and you did the processing and packing, is that correct?

A. They furnished the fruit. We furnished all the other component parts to make up the finished product, with the exception of the label. [2720]

Q. Now, is that the only time that you have ever had a processing arrangement with any of the Sunkist group? A. That's right.

Q. Calling your attention to the spring of the year 1951, did you have any discussions with Mr. Finley in regard to the possibility of entering into an arrangement to process single-strength juice for the Sunkist people?

A. In the spring of 1951, I could not determine the date, I would guess it would be somewhere in April, there was a telephone conversation with Mr. Finley. He indicated that there was a possibility that there might be some contracts made with various packers that year in view of the fact that there were indications of a more than ample supply of fruit.

Q. Was this conversation before you had made any arrangements with anyone for a supply of fruit for the Case-Swayne Products?

A. Yes, it was.

Q. Did Mr. Finley outline to you the terms of an arrangement that he would like to have you consider?

(Testimony of Amos Swayne.)

A. Not in I would say too much detail, but enough basic information for us to evaluate the possibility.

Q. Could you tell the jury generally what the outline of the basis that he discussed with you was?

A. Generally, the outline was that Mr. Finley would have a contract that would provide a packer so much per case [2721] to pack orange juice which would include all costs, with the exception of the fruit cost itself.

Q. All processing costs, was that?

A. That is correct.

Q. After the juice had been processed and you had been paid for the processing cost, did he tell you what the further steps in the transaction would be?

A. He indicated that there would be a predetermined price at which we could buy the finished merchandise back from them to be marketed under our own label or to customers of ours for their own private label.

Q. Did he give you some figures on the proposed allowances that he had in mind?

A. Yes. There were figures that were given. I can't recall at this time what those figures would be, but there were certain allowances that would be set up. [2722]

Q. After that telephone conversation with Mr. Finley, what did you do?

A. We in our company analyzed it to the best of

(Testimony of Amos Swayne.)

our ability, and after some period of time we decided that we were not interested.

Q. Did you so advise Mr. Finley?

A. We did.

Q. About when was that, in the spring of '51, that you advised him that you wouldn't go ahead?

A. It might be late April or early May. I couldn't be sure of the exact time.

Q. So you didn't have any processing arrangement with Sunkist that year?

A. We did not.

Q. You did during the year 1951 enter into an arrangement with Morgan Ward representing the Independent Growers for processing Valencia oranges into single-strength juice, did you not?

A. We did.

Q. When was it that that arrangement was first discussed?

A. Some time about approximately the middle of May, I would say.

Q. Do you recall whether the subject was one that you first mentioned to Morgan Ward or whether he first mentioned [2723] it to Case-Swayne?

A. I don't recall exactly how it came about. I am of the opinion at this time that it came about during either a telephone conversation or at lunch, or some such situation as that.

Q. Will you describe briefly the substance of the arrangement as it was worked out and carried through during the Valencia season of 1951?

(Testimony of Amos Swayne.)

A. We submitted to the Independent Growers a schedule of what we would consider fixed costs to produce canned orange juice in various sized containers, which would be all the fixed costs with the exception of the cost of the raw product itself, freight, or discounts that would be allowed the ultimate purchaser.

Q. After you had worked out those allowances, how was the fruit delivered, how was it marketed and how was it accounted for to the Independent Growers?

A. The Independent Growers would advise us that there were certain quantities of fruit available at certain of their members' packing houses. We would dispatch trucks to pick the fruit up and pack it and proceed to sell it.

Q. When you packed it you would be paid these agreed upon processing allowances, those direct costs, is that correct?

A. Not as such, no. In the agreement we would agree [2724] to pack the fruit for certain predetermined fixed costs, and then we also sold the finished product, and once a week we would remit to the Independent Growers the returns on the finished product that was sold, from which we would deduct the predetermined costs and discounts, and a mark-up that we took as per the agreement.

Q. After you had sold the product, what margin of profit were you allowed in making your return to the Independent Growers?

A. 3 per cent of the net proceeds of the sale.

(Testimony of Amos Swayne.)

Q. That is, if you sold a case for $2.50, that means that your profit would have been 3 per cent of that gross price, or 7½ cents on the case?

A. No; it would be 3 per cent of the net price after all discounts had been allowed.

Q. Will you work——

A. In other words, if the selling price were $2.50, if you had a cash discount of 2 per cent and a swell allowance of a quarter of 1 per cent, those discounts were deducted from the selling price, and the result thereof, the 3 per cent would apply to. In other words, if that result were $2.45, our return from that operation would be 3 per cent of $2.45.

Q. That is what was allowed for profit?

A. That is correct. [2725]

Q. Mr. Swayne, do you recall, or do you have data with you from which you can refresh your recollection as to the prices of single-strength juice during the summer and fall of 1951?

A. Yes, I do.

Q. Can you tell us generally what the trend of those prices was?

A. On June 9, 1951, our average selling price for a case of 12/46 ounce cans was $2.92; on June 23rd the average selling price was $2.71; on July 7th the average selling price was $2.68; on July 21st it was $2.62; on August 4th it was $2.22; August 19th it was $2.14; September 1st, $2.16; September 15th, $2.23; September 30th, $2.41; October 14th, $2.58;

(Testimony of Amos Swayne.)

October 28th, $2.68; November 11th, $2.73; November 25th, $2.75.

Those figures are to the nearest one cent.

Q. Do you recall what it was that caused the abrupt decline in the price of juice from $2.92 in the early summer to less than $2.15 by the middle of August? A. An overproduction in Florida.

Q. How did the overproduction in Florida affect the prices at which you were selling the single-strength California juice?

A. It was necessary for ourselves, as well as any other packer, if they wanted to sell merchandise, to compete [2726] with Florida prices wherever the market was.

Q. Does that mean that the prices that are obtainable even in Los Angeles for California juice have to be priced competitively with Florida juice offered in that market?

A. That is generally correct, yes.

Q. When you quoted these lower prices, you were not reducing prices just for the sake of cutting prices, but to meet competition with Florida, is that correct?

A. As a matter of meeting competition with Florida, and to move out the merchandise that was being packed. In other words, if we did not meet the competition, the merchandise that we were packing would sit in the warehouse.

Q. Over the years have you had any regular source of raw fruit supply for your packing operations in citrus products?

(Testimony of Amos Swayne.)

A. By and large our supply of raw production oranges, particularly, has been through either the Independent Shippers, as a group, or through the Exchange.

Q. Are you able to tell us whether there is any consistent relationship over the years between the prices at which you bought fruit from the Independents, as compared to prices at which you bought from the Exchange?

A. I would say for all intents and purposes through the years they have been pretty well parallel. There could be, depending on the particular situation in that particular [2727] year, there might be a variation between the two, if the crop was short or long, one might be slightly below or slightly over the other, but for all intents and purposes they are practically parallel. [2728]

Q. It is not true, is it, that one is consistently above and the other consistently below the other?

A. I don't believe that is correct, no.

Q. Now, in the normal season is there any tendency as to the change in the price of fruit from the beginning of the Valencia season on through to the end?

A. Generally, I believe the trend would be that in the early part of the season the fruit would be at its lowest point and would increase as the season progressed.

Q. That would be the ordinary course of events, would it?

A. That is correct. There are exceptions, of course, but that is the ordinary course.

(Testimony of Amos Swayne.)

Q. You appeared here today pursuant to a subpoena that was served on you by the defendants, is that correct? A. That is correct.

Mr. Strachan: That's all on direct examination. Thank you.

Cross-Examination

By Mr. Dixon:

Q. Mr. Swayne, I believe you testified that the primary business of your company was food processing in products other than citrus juices, is that correct?

A. We pack fruits, vegetables and citrus juices.

Q. By that I mean about 70 per cent of your products [2729] that you process are products other than oranges?

A. Yes, that is correct, in dollar volume. I am referring not to units of production, but the dollar volume.

Q. So that the citrus juice processing part of your business constitutes about 30 per cent, does it, of the total dollar volume of products handled by your company? A. That is correct.

Q. In that 30 per cent of your total sales, I believe you testified you made some products like single-strength juice and blends, juice blends, is that correct? A. That is correct.

Q. Now, I think you mentioned the fact that in 1950 you had a processing arrangement with Sunkist whereby you processed some oranges and grapefruit into one of the blended juices that you

(Testimony of Amos Swayne.)

make, is that correct? A. That is correct.

Q. Do you remember the approximate tonnage that was handled under that arrangement?

A. I would be guessing, but I am sure that it would be in the neighborhood of not under 500 tons and not over 800 tons combined.

Q. That was blended juice?

A. That is correct. That is combined.

Q. By the way, your company doesn't make any frozen concentrated juices, do you? [2730]

A. No, we do not.

Q. And you didn't make any in 1951?

A. No frozen concentrate. We have frozen single-strength, but not frozen concentrate.

Q. Under that arrangement that you had with Exchange Orange in 1950, you just processed and canned the blended juice and it was turned back to Exchange Orange, was it not?

A. That is correct.

Q. And you were paid for performing the processing and canning operations?

A. That is correct.

Q. And you didn't under that arrangement buy any of the blended juice that you processed for Exchange Orange, did you? A. No.

Q. You mentioned some contact that Mr. Finley had with you early in 1951, I think you said the spring of 1951, about making some processing arrangement with Exchange Orange during that year. Do you know Mr. Kelly of Sunkist? A. I do.

Q. He is the head of the product orange depart-

(Testimony of Amos Swayne.)

ment of Sunkist, is he not, or was he, I mean, in 1951.

A. As far as we were concerned, he was the person that we looked to if we were discussing by-product oranges. Whether he was the actual head of it or not, I don't know. [2731]

Q. Do you recall whether Mr. Kelly contacted you in the spring of 1951, also, with reference to securing your views as to what price Sunkist should charge independent processors during the coming season for product oranges sold to them?

A. I don't know that there was ever a discussion as to what the price of the fruit should be. There were probably several discussions as to what the outlook was, what the price structure might be. That might be common in several years.

Q. I am talking, Mr. Swayne, just about any discussions that Mr. Kelly might have had with you in the spring of 1951 before Sunkist announced any selling price to processors for that year of Valencia oranges that they might acquire from Sunkist.

* * *

A. We had discussions with Mr. Kelly, but I can't say that I recall discussions about what the price would be for the fruit.

Q. Well, specifically, do you recall any conversation, Mr. Swayne, with Mr. Kelly in the spring of 1952 as to the price that processors might be able to pay for Valencia oranges in the 1951 season that might be processed into single-strength [2732] juice?

(Testimony of Amos Swayne.)

A. In general terms only. The indications, as I recall, were that there was a big possibility that it was going to be a very competitive situation. No. 1, Florida was packing a considerable quantity of juice. No. 2, California had a very large crop, or the prospect of a very large crop of oranges. I don't think we could have been in a position at that time to intelligently have said what the price of the fruit should have been.

Q. 1951 was a good crop year for Valencia oranges, was it not? A. That's right.

Q. Well, getting back to your discussion, then, with Mr. Finley, you say he called you on the phone and offered your company some kind of a processing deal on Valencia oranges?

A. He did not offer us a deal. He indicated that there was a possibility of contracts for that year and he would like to give us some of the pertinent facts about it and what we would think about it, but actually, as far as a specific offer being made of a contract, at that point there was none. [2733]

Q. I think you mentioned something about a conversation with him when this proposed arrangement was being discussed, in which he suggested that after processing it and being paid for the processing, that you would have the privilege of buying the product that you processed at the Sunkist price?

A. At a predetermined price.

Q. At a predetermined price?

A. Yes; whatever that would have been. There

(Testimony of Amos Swayne.)

was no figure in that, I don't believe, that was mentioned.

Q. Do you recall what the discussion was with reference to the payment to your company under this proposed arrangement for processing costs?

A. Actually, I do not. At the time Mr. Case and I, with the information we had, evaluated it, considering all the elements in the market, and finally decided that we were not interested; we would rather take our chance in the open market.

Q. Now, in any event, you didn't proceed any further with that kind of discussion with Mr. Finley, and nothing came out of it as far as the Exchange Orange and Case-Swayne were concerned?

A. No. There were about two or three discussions, but nothing ever came out of it.

Q. Your company, of course, during the preceding year, [2734] that is, the processing year 1950, had processed some Valencias into single-strength juice, had they not? A. Yes, sir.

Q. And you had some inventories left from that processing operation during the early part of '51; is that correct? A. That is correct.

Q. And those products, that is, what you processed into single-strength juice during the 1950 season, was disposed of, was it not, before the 1951 season opened on single-strength Valencia juice?

A. By and large, but we did have some quantity that was disposed of about the time that the new pack was coming in.

Q. Can you tell the jury approximately how

(Testimony of Amos Swayne.)

many tons of Valencia oranges your company purchased from any source whatever in 1951?

A. When you ask "purchased," are you referring to——

Q. I am excluding the Ward arrangement that you testified to.

A. I couldn't be too sure of the actual amount, but I would say that it was not over 1,000 to twelve or fifteen hundred tons. And that figure might be wrong.

Q. Would suggested figures of 595 tons of Valencias and 486 tons of navel oranges mean anything to you with reference to the purchases of both of those types of oranges [2735] in 1951?

A. From what sources?

Q. From any source.

A. Well, that adds up fairly close to what I have been talking about. I don't have any record here that would point it out.

Q. Do you recall, Mr. Swayne, when the last purchases were made of Valencia oranges by Case-Swayne during the year 1951? I mean were they made in May or did you continue to purchase through the processing season of that year?

A. We made some purchases in May and some—it might have been October or November, the very end of the Valencia season, so I would say that we purchased some at the very beginning and the very end of the season. We did not purchase any during what could be considered the peak of the Valencia season.

(Testimony of Amos Swayne.)

Q. Do you know what Sunkist was offering Valencia oranges to processors on the open market for in 1951?

A. I couldn't be sure of the price, because we were not in the market to buy. And I don't know that we had any discussion at that time with the Exchange as to their price.

Q. Let us assume that it was, say, $40 per ton for 120 pounds soluble content per ton, does that refresh your recollection any as to what it might have been, if you know?

A. Do you mean does $40 mean that might have been the [2736] price?

Q. Yes.

A. Well, I would say that it could have been in that neighborhood, but I again say that as far as any direct quotation is concerned, we did not have any.

Q. In any event, you didn't buy or purchase any oranges from any source in 1951, did you, for the purpose of processing them into single-strength orange juice at any $40 price?

A. I don't believe we did; no. Unless—I don't know what we paid for the oranges that we bought at the very end of the season. It was necessary for us at that point to build our inventory up to be sure that we had sufficient inventory to carry us to the beginning of the next season. Now, what we paid at that point I couldn't be sure, but I—I don't know whether we paid $40 or $30. I know we bought

(Testimony of Amos Swayne.)

some from the independents at about a $30 level late in the season, after we had terminated our agreement with them.

Q. Let me ask you this question, Mr. Swayne: Assuming that you would have to pay that price for Valencia oranges during the processing season of 1951, based upon your knowledge and experience as a processor of Valencia oranges into single-strength juice, could you have purchased oranges, and paid for them at that price, and sold them in the market at any time during the year 1951, at anything except a loss? [2737]

A. I am afraid that 90 per cent of the time of the year it would have been at a loss.

Q. You mentioned that you had some arrangement with Mr. Ward who represents the Independent Growers—does he? A. That is correct.

Q. And pursuant to an arrangement made with him as representative of the Independent Growers, you did handle some Valencia oranges for that organization in the year 1951 under some kind of arrangement that you testified to; is that correct?

A. It is.

Q. I believe you also testified that you not only processed oranges turned over to you by Mr. Ward under this arrangement into single-strength Valencia, but you also acted as marketing agent for this organization in selling the juice so processed; is that correct? A. That is correct.

Q. Do you know whether the Independent Growers, represented by Mr. Ward, has any marketing

(Testimony of Amos Swayne.)

organization of any kind for any juice products of the kind that you processed under this arrangement? A. Not to my knowledge.

Q. They have none?

A. They have none to my knowledge.

Q. You do know, do you not, that Sunkist is the marketing [2738] agent for all juice products processed by Exchange Orange, which are turned out into canned juices, do you not?

A. As far as I know; yes. [2739]

Q. So that in processing these oranges that were made available to you, that is to Case-Swayne, into single-strength juice, you not only processed them, but you acted as marketing agent for the association, and paid the balance remaining, after having performed the selling operation and deducting your selling commission, to that organization; is that correct? A. That is correct.

Q. And in determining the processing costs that this organization paid you for processing the oranges into single-strength juice, did that include any profit of any kind at all on the processing operation? A. No; it did not.

Q. So that under the arrangement that you had, your profit from this operation, after having paid all operating and processing expenses, was the amount which you have mentioned which remained, I think it was some three per cent, of the net proceeds from the selling price; is that correct?

A. That is correct. In this cost we had our fac-

(Testimony of Amos Swayne.)

tory overhead and general administrative cost as a part of the cost to produce a unit.

Q. Now, I want to ask you one question about this Florida price situation, Mr. Swayne. By the way, this processing operation was started for the Independent Growers when? [2740]

A. Well, I believe that the first that we produced would have been the last day or so of May or the first day of June.

Q. Rather early in the season?

A. That is correct.

Q. That is about the end of the Florida season, I mean as far as Florida juice appearing in the market is concerned?

A. No; not as far as the Florida juice appearing in the market. As far as their processing period, there is no fruit available generally after that time. They have put up the pack and it is in their warehouses or wherever it may be, but it is still available to the market, the finished juices.

Q. Your job was to get rid of what you had processed? A. That is correct.

Q. And to pay the net, after deducting your expenses, to the Independent Growers who supplied the fruit? A. That is correct.

Q. And they did not have any processing facilities except as they were performed through your organization; is that correct?

A. To the best of my knowledge, that is correct.

Q. Do you recall just what the Florida price was

(Testimony of Amos Swayne.)

in the western market at the time you first came out with this product under this arrangement?

A. I don't recall what the exact price would be, no. [2741] The only thing I could say is that we were meeting, in all instances at that time we were meeting what we would consider Florida competition in selling, and established our price accordingly. So the prices that I read off awhile ago in theory might have been the Florida prices.

Q. Your instructions were, were they not, Mr. Swayne, under this arrangement with Mr. Ward to move the juice and get the proceeds to the grower, not to hold any inventories; is that correct?

A. Our instructions were to pack and sell and get the best possible price under the existing condition.

Q. About how many tons did you process under this arrangement, do you recall?

A. I would say it would be approximately 5,000 tons.

Q. I think you testified that there are two sources of fruit available to the independent processor in this area, that is the Independent organization, for whom you processed in 1951 under the arrangement you have mentioned, and Sunkist; is that approximately correct?

A. Those are the two sources of supply that are available to us largely; yes.

Q. While you were processing these 5,000 tons, or whatever it was that you secured from Independent Fruit Growers Association, was your company

(Testimony of Amos Swayne.)

also carrying on other food canning and processing operations? [2742] A. Yes.

Q. And what were they?

A. It would depend a little on the time of the year, but during that particular period we could have been packing boysenberries and apricots, peaches, perhaps fresh Fordhook lima beans.

Q. So that this was just one part of the food processing operation that your company was carrying on during the season; is that correct?

A. As it has always been; yes.

Mr. Dixon: Thank you very much.

Redirect Examination

By Mr. Strachan:

Q. Just a question or two, Mr. Swayne. Of the various products that your company packs, I think you said citrus represented about 30 per cent of the output? A. Yes.

Q. What is the product which is the largest single product produced?

A. By variety, if you are speaking of by varieties, of any individual variety, citrus juices as a variety would represent the largest single variety that we produce.

Q. After you had completed the production for Mr. Finley of the blend, I think you said it was, did he ever express any dissatisfaction with the quality of your product, [2743] such as that there were specks in it or any other infirmity?

(Testimony of Amos Swayne.)

A. No; not to my knowledge.

Q. In cross-examination you said that you did not believe the Florida processor in the season of 1951 could pay $40 for fruit and process it into single-strength Valencia juice at a profit; is that correct? A. Florida processor?

Q. I am sorry. I will restate it.

I think you testified California processors could not buy $40 fruit in the 1951 season and process it and sell it at market prices and make a profit; is that correct?

A. I believe I said that largely that was correct. There might have been a period in that year when it would have been possible to have done it. I don't know. But for all practical purposes, you could not.

Q. And that was because of the fact, was it not, that the Florida prices had so depressed the market that there couldn't be a profit realized by the California processors?

Mr. Dixon: If the court please, I think that is a question for the jury. Object to the form of the question. It calls for a conclusion.

The Court: Sustained. Reframe the question.

Q. (By Mr. Strachan): Was that because the market price during most of the year was so low that on $40 fruit a processor could not make a profit? [2744] A. That is correct.

Q. Now, you did during the 1951 year pack for your own account and for your own inventory single-strength Valencia juice in addition to that

(Testimony of Amos Swayne.)

that you processed and packed under the Morgan Ward processing arrangement; is that correct?

A. We did.

Mr. Strachan: That's all.

Mr. Dixon: Well, now——

The Court: Now, let's end this up.

Mr. Dixon: I have one question, your Honor, only because of the last question by counsel.

Recross-Examination

By Mr. Dixon:

Q. When was that pack, Mr. Swayne?

A. Part of it would have been packed in the early part of the season and part of it would have been packed in the late part of the season.

Q. None during the actual processing season for Valencias? A. That is correct.

Mr. Dixon: That's all.

The Court: Let me ask one question, now. Just one question. With lawyers and judges, you know, it is just one question, and it turns into a string of questions. [2745]

Did you have facilities in 1951 to have packed more single-strength juice without straining the capacity of your plant?

The Witness: Yes; as far as packing is concerned, we could have packed substantially more.

The Court: But whether or not you did pack more, I suppose involved a variety of considerations, the market——

(Testimony of Amos Swayne.)

The Witness: Well, your Honor, I would say that the fruit that we received from the Independents was the fruit that they felt, I guess, was in surplus, at least they wanted it put in the cans by us. Now, whether they had sold fruit in other directions and for other purposes and how much, I don't know. But we were taking at that point what they made available to us.

The Court: I am speaking of what you packed for your own account.

The Witness: Oh, pardon me.

The Court: How much you would pack, I suppose would depend upon a variety of considerations, the state of the market?

The Witness: Yes.

The Court: The price of the raw product, your outlets, and what you had to supply, and other factors?

The Witness: We were only—in carrying an inventory that year, our primary interest was to try to maintain our [2746] position with the customers as far as our own label on the grocery shelf was concerned. We were certainly not anxious to carry any large inventory, because conditions were very uncertain. [2747]

* * *

JOHN A. LYNCH

a witness by and on behalf of the defendant, having been previously duly sworn, was examined and testified further as follows:

Direct Examination
(Resumed)

By Mr. Strachan:

Q. Mr. Lynch, when we adjourned this [2748] morning you were still on direct examination, and I was asking you about your analysis of the earnings or profits shown in the prospectus for the Winckler & Smith Citrus Products Company from the time of its organization until the end of the year January 31, 1951, which prospectus stated it at approximately $560,000. Based upon your audit, what have you determined the earnings or profits for that period to be?

A. Based on our examination the total earnings of the co-partnership and the corporation since its inception resulted in a deficit of $302,371.07, as contrasted to the $559,690.88 profit as reflected on the prospectus, a difference of $861,000.

Q. Now, the prospectus makes reference to there having been non-recurring losses on account of inventory losses prior to the first bankruptcy reorganization proceeding; have you examined into the amount of the inventory losses as recorded in the books and records of the business prior to that first bankruptcy proceeding to determine the amount thereof? A. We did.

Q. And what did you determine from the books

(Testimony of John A. Lynch.)

and records to have been the amount charged off on account of non-recurring inventory losses referred to in the prospectus?

A. The analysis of the books for the prior period reflected that at January 31, 1947, journal voucher 201, a [2749] write-off of $142,122.53 was made against the inventory for the year ended January 31, 1947; for the year ended January 31, 1948, the inventory write-off included a write-down July 31, 1947, of $38,083.12, and the year-end write-down of $9,766 as reflected on the books of account. This aggregated approximately $190,000 write-down from February 1st, 1946, to January 31, 1948. [2750]

Q. Those are the only inventory write-downs appearing in the records for that period?

A. That is correct.

Q. Now, turning to the subject——

The Court: Now, before we leave that subject, ladies and gentlemen, this evidence is offered in rebuttal to representations or statements appearing in the prospectus. There is no issue in this case that anyone was defrauded. We are not trying a mail fraud case and we are not trying a case of an investor who invested money on some representation. It has been stipulated that the defendants had no knowledge of the contents of these financial statements of the plaintiff prior to the year in question. I think that was agreed upon.

Mr. Strachan: I don't recall such a stipulation.

The Court: I recall it in line with an objection made earlier in which Mr. Dixon asked that question

(Testimony of John A. Lynch.)

of counsel, made his objection based upon that ground.

Mr. Strachan: Let's check the record. I don't happen to recall it, your Honor.

The Court: Do you contend that the defendants in this case had any knowledge of the financial statements of this company prior to the end of the year 1951, prior to January 31, 1951?

Mr. Strachan: The question hadn't occurred to me. I don't know whether they had or had not. I can check the fact, [2751] and if we can agree on the fact, I have no objection to a stipulation.

The Court: Well, we will leave that subject to check, but the main point is that this is admitted for a limited purpose and not for the purpose of showing fraud on the part of any investor or buyer, matters of that sort. Again, the evidence must be considered in connection with the issue in the case, what was the status of the company in 1951, and the ultimate issue is not what its status was in 1946, 1947, 1948, 1949 or 1950. But any way in which that has any bearing in determining its status in 1951, you may consider it.

All right, proceed.

Q. (By Mr. Strachan): Mr. Lynch, have you determined what amounts were paid to Mr. Winckler during the three fiscal years following the first reorganization? First, in salary——

A. I have.

Q. By the years and in total? A. I have.

(Testimony of John A. Lynch.)

Q. What is the amount by years and the total paid in salary?

A. For the year ended January 31, 1950, salary was $12,319.02.

For the year ending January 31, 1951, the salary was $14,619.30.

For the year ending January 31, 1952, the salary was [2752] $14,458.88.

A total of $41,397.20.

Q. That is salary alone?

A. That is stated in accordance with our examination.

Q. How much was paid in bonus in any one of those years?

A. We have classified the bonus in the year January 31, 1951——

Mr. Dixon: You mean the year ending that time?

The Witness: That is true, the year ending January 31, 1951, as being $3,550.

Q. (By Mr. Strachan): With respect to allowances paid to Mr. Winckler in each of the years——

Mr. Dixon: If the court please, I am going to object to any evidence on this unless this witness specifies in detail what the amounts are that he calls allowances and for what the records of this corporation show they were allowed.

The Court: I think we should have the term defined, allowances. What do you mean by allowances, Mr. Witness?

The Witness: The allowances were for automobile and travel charged to the account monthly,

(Testimony of John A. Lynch.)

and I believe it was $200 a month granted to Mr. Winckler and it was charged to automobile, and $120 a month charged to travel. Not in every month, but to the extent that these totals reflect here. There were other items. I can be specific. But there were other items for various reasons, and they were charged to these [2753] various accounts. I have the detail.

The Court: Travel and auto and other items were considered by the company as expenses?

The Witness: That is correct, your Honor. These represent——

The Court: Do you have the breakdowns of these amounts and what they were for?

The Witness: Yes, your Honor.

The Court: In subtotals?

The Witness: Yes, your Honor.

The Court: I don't mean penny by penny, but do you have an itemized statement in sub-totals?

The Witness: Yes, your Honor.

The Court: All right. Let's take up the year ended January 31, 1950. Go ahead, Mr. [2754] Strachan.

Mr. Strachan: Does your Honor have a question pending?

The Court: I just said, let's start with the year ending January 31st, '50.

I said go ahead. I didn't really ask a question.

Mr. Strachan: I see.

Q. (By Mr. Strachan): What was the amount

(Testimony of John A. Lynch.)

of the allowances, in the aggregate, for the year ending January 31, 1950?

A. I don't have them in the aggregate, because these are just checks to Mr. Winckler. Checks made to any other individual, or any other agency, are not in my total.

The Court: That is what he is asking you, Mr. Witness, the allowances made to Mr. Winckler that you are talking about.

The Witness: I only recorded the cash checks to Mr. Winckler.

If a check was paid to Pennsylvania Railroad and charged for Mr. Winckler's account, I didn't record those.

Mr. Dixon: If the court please, just a moment. I think that if that is all this witness has, and he can't tell this jury and the court what these amounts that he claims were allowed for——

The Court: Just a minute.

Overruled.

He said he is going to give the breakdown of this amount [2755] year by year of amounts paid to Winckler, and what they are generally for.

The Witness: That is right.

The Court: What do you have for the year ending January 31, 1950?

The Witness: For the year ended January 31, 1950, I have $340 charged to rent; for the year ended January 31——

The Court: What was that?

(Testimony of John A. Lynch.)

The Witness: That was check No. 4472, on June 9, 1949, to Mr. N. J. Winckler, charged to rent.

The Court: Just rent?

The Witness: That is correct.

I have a total of $750 charged to telephone and telegraph; I have a total of $21.33 charged to gas; I have checks totalling $1,530.15 to traveling; I have checks for $249.90 charged to other ingredients used; I have checks for $300 charged to selling; I have checks for $420 charged to auto expense; I have checks for $93.39 charged to interest; I have a charge for $16.66—it is a check—to bank charges. That totals $3,721.43 for the year ended January 31, 1950.

Juror Berger: The $300 rent, is that personal rent or hotel expenses?

The Court: I asked the witness, and he is going by the books and all he knows is that it says, in the books, "Rent." [2756]

You don't know, do you?

The Witness: No; I don't, your Honor.

The Court: It can be inquired into later by counsel. The year ending January 31, 1951, what was the total of allowances that you calculated?

The Witness: $9,306.86.

The Court: What were your subtotals of that?

The Witness: I have $1,961.04 charged to traveling; I have $10 charged to interest—excuse me—$10 to accrued interest; $5.00 to interest expense; $120 to miscellaneous expense; $6,450.82 to executive travel expense; $760 to executive auto expense.

(Testimony of John A. Lynch.)

That is the total for the year ended January 31, 1951.

The Court: What is your total for the year ending January 31, 1952?

The Witness: My total for the year ended January 31, 1952, is $6,219.37.

The Court: What is your breakdown on that?

The Witness: My breakdown is $4,933.37 to travel expense; $1,230 to auto expense; $56 to advertising; totaling $6,219.37 allowances for the year ended January 31, 1952.

Q. (By Mr. Strachan): Mr. Lynch, one of the claims of the plaintiff is that there was a loss of good will incurred by Winckler & Smith Company. Have you made any studies to determine whether at any time after the first bankruptcy there [2757] existed——

Mr. Dixon: If the court please, I am going to object——

The Court: Let him ask the question first.

Q. (By Mr. Strachan, continuing): ——there existed any good will?

The Court: Mr. Dixon.

Mr. Dixon: If the court please, I am going to object to the use of the word "bankruptcy" by counsel. This corporation was never in bankruptcy, and he well knows it. Unles your Honor will so instruct the jury. It is misleading.

Mr. Strachan: Since——

The Court: Let's not quibble about these things.

Mr. Strachan: Chapter 11.

(Testimony of John A. Lynch.)

The Court: The reorganization proceedings under Chapter X or XI aren't bankruptcies in the sense that the layman uses the term, but they are proceedings under what we speak of as the general bankruptcy statutes. The purpose of them is to avoid ultimate bankruptcy as the layman uses the term. A company may come out of reorganization and succeed. It may never come out of reorganization and go into liquidation, which is, in the layman's term, what a bankruptcy is. So we know at all times that we are talking about the reorganization proceedings, the first one being under Chapter XI.

So the objection is overruled, and reframe your question, if you will. [2758]

Mr. Strachan: Surely.

The Court: First, though, Mr. Witness, can you ascertain from books of a corporation, alone, without investigation of its customers and their business contacts, what good will is?

The Witness: I would say yes, your Honor. It is customary to make a calculation of good will based on the earnings history of a corporation. The earnings history, after careful study should yield a return——

The Court: Your answer to this question, if it were made, then would be based entirely on earnings history?

The Witness: And capital invested in the corporation.

(Testimony of John A. Lynch.)

The Court: But you would not take into account in that answer any other factors?

For instance, if I had a hamburger stand on a busy corner where 10,000 people had to pass every day, I think in at least a layman's sense of the word my prospect of business would be called good will, would it not?

The Witness: It would be reflected in your earnings, your Honor. Your location is reflected in your earnings, your position in the industry, the character of your customers and the ability to retain them, have repetitive customers, the morale of your personnel, all are reflected in your earning power.

The Court: What was the question again, now? You were going to revise your question. [2759]

Q. Have you made any studies, Mr. Lynch, to determine whether or not there existed any good will attaching to the business of Winckler-Smith Citrus Products Company after the time—no—at any time during its business life? A. I have.

The Court: Well, now, ask your next question, but I think we have got a problem.

Q. (By Mr. Strachan): Will you tell us on what you based your studies?

The Court: Well, counsel, to save time, I don't think the question is proper, because I think it is an ultimate question for the jury and it is not proper for a witness to characterize it either for the plaintiff or the defendant in the sense of saying that there was none or there was so many dollars' worth, any more than if I was trying a criminal case a

(Testimony of John A. Lynch.)

witness could get on the stand and be asked the question, "Was the defendant guilty of this offense?" or if I was trying a negligence case, could you ask the witness, "Was the defendant negligent?"

Mr. Strachan: Your Honor, there are various formulae used for calculating the existing or nonexistence.

The Court: I will not object to a description to the jury of how an accountant would formulize it or the formula he would use, but your first question, and then you reframed it, went into some other matters. You asked the ultimate [2760] question. If you want to ask the witness what formula he would use as a CPA in calculating good will, you may do so. I am talking about the ultimate question which was involved in your first question, although it was not in your later one, but I figured we were going to get back to it again.

Q. (By Mr. Strachan): Mr. Lynch, are there any recognized formulae or formulas which are ordinarily used by people in the accounting field for determining the existence or nonexistence of good will and the value of good will, if it exists?

A. There are several basic formulas.

Q. Give me one.

A. Well, one basic formula, and I believe the most common one, is the one used by the income tax unit known as Formula ARM-34.

Q. What does ARM-34 mean?

A. ARM is a symbol for appeals and review

(Testimony of John A. Lynch.)

memoranda of the Treasury Department. 34 is the number that was applied to that formula, to the bulletin, ARM-34.

Q. Does that bulletin set up criteria and means for determining the existence and extent of good will? A. It does.

Q. Will you describe the general principle of that ARM-34 formula?

The Court: Now, let me ask this question again to save [2761] time. Is this formula that you are going to tell us about now one that is applied particularly in tax cases? You say there are several formulas: Is there another formula that is applied in standard bookkeeping practice aside from tax purposes?

The Witness: They are all used, your Honor, for every purpose. There is more than one basic formula. The ARM formula appears to be the most popular.

Patton and Patton, a well-recognized accounting text book, and Kennedy, and even the Supreme Court, have followed those formulas as presented by ARM-34 and as presented by applying a percentage return to assets invested in a business and capitalizing the excess earnings attributable to those assets.

The Court: In other words, although it grew out of the tax field, it is a generally recognized formula that could be applied and is applied by CPA's in determining the facts to reach the question of good will?

The Witness: That is correct, your Honor.

(Testimony of John A. Lynch.)

The Court: All right. Go ahead. Tell us what the formula is.

The Witness: The formula ARM-34 presupposes that good will necessarily embraces a return to a corporation of an amount over and above that which would normally be returned by another similar corporation in the same industry. It [2762] takes the position that any prudent investor would secure a favorable return on his money. Any return over and above that amount would be considered attributable to some other factor, such as location, reputation of the product, ability to keep the demand for the product, the executive ability of the corporation, the corporation's integrity and longevity.

Under ARM-34, they apply a 10 per cent return as normal to the net equity of the corporation or the net worth of the corporation. Any return over and above the 10 per cent return is attributable to a factor other than just being in business.

The 10 per cent is applied to the results of an average of five years' operations, never less than three years. The five years' operations are averaged and the net worth invested for the period is averaged.

Application of the 10 per cent rate to the net worth of the business and the subtraction therefrom from the actual earnings gives the amount which ordinarily would be capitalized as good will. This amount under ARM-34 is then usually capitalized over a five-year period.

(Testimony of John A. Lynch.)

That in substance is the ARM-34 formula.

Q. (By Mr. Strachan): Now, will you tell us what result you reach if you apply to the Winckler & Smith financial records and its earnings and its net worth the formula that you have just described?

A. Averaging the five years' earnings per the exhibits [2763] here, without any adjustment by me, for the period ended January 31, 1951, results in an average annual deficit in earnings of $1,398.64. Applying the ARM-34 to that negative figure would give me a negative capitalization of earnings, and considering the fact that the return at 10 per cent should have been made on the net worth as invested, adding the net worth of the business as specified on those exhibits without adjustment by me, the net result is a negative good will at that date of $96,018.40.

If I carry the computation through the year ending January 31, 1952, the computation results in a negative good will of $444,633.70.

Q. Now, were there any other——

The Court: Of course, you did indirectly what I said you couldn't do, but nobody objected.

Mr. Strachan: I didn't think it was objectionable, either, your Honor.

Mr. Dixon: I did, your Honor. I am going to object.

The Court: It doesn't make any difference. I think you did indirectly what I said you couldn't do, but nobody objected, and so here we are. Go ahead.

Q. (By Mr. Strachan): Were there any other

(Testimony of John A. Lynch.)

means recognized for attempting to evaluate what is called the good will of a business?

A. There are several other basic formulas. [2764]

Q. Will you mention another?

A. One presupposes that every asset invested in the business, whether it is borrowed capital, creditors' capital, will result in earnings. You may start a corporation with $100,000, but borrow 400,000, and in that case you would have $500,000 worth of assets. This basic formula presupposes that that $500,000 worth of assets should produce results notwithstanding they are borrowed.

They apply the percentage to those $500,000 worth of assets and capitalize any excess earnings resulting from those.

If we utilize that formula in this instance, we would have a much greater negative good will, because the results of the average earnings come out negative.

Another method of computing good will is to take the straight arithmetical average on five years' earnings and capitalize it at a given percentage at which those earnings will—capitalize the arithmetical average of five years' earnings over a specified purchase period. If you are willing to buy the business and pay five years' earnings to purchase it, that is a straight capitalization of earnings.

Q. Well, would you tell us how you applied that to the Winckler-Smith operation?

A. I did apply it. If I apply that straight arith-

(Testimony of John A. Lynch.)

metical average to the net worth of the business as reflected [2765] on these exhibits——

The Court: According to your computation.

The Witness: No. Unadjusted, your Honor.

The Court: All right. Make it clear what you are talking about.

The Witness: At January 31, 1951, the net worth of the operation, of the corporation here, unadjusted by me, was $178,050.40. The average annual loss was $1,398.64, as reflected by these statements, unadjusted by me.

The capitalization of those earnings over an eight-year period would give a deficit earnings of $11,189.12 which, added to the net worth, gives a negative good will of $189.239.52.

Considering another year addition, taking a six-year average, for the subsequent year, January 31, 1952, using the same formula, the negative good will would be $825,428.64. [2766]

(Whereupon, the jury left the courtroom and the following proceedings were had in the absence of the jury:)

The Court: The record will show the jury absent. I suppose you are going to use another witness as to BS, [2767] or whatever exhibits you propose to use on the mythical 12,000 tons?

Mr. Strachan: Just between us, your Honor, I wish we could have a different designation on that exhibit.

The Court: You worked yourself into a hole by your numbering system.

Mr. Dixon: I think it is properly lettered, your Honor.

The Court: I hadn't noticed that. You are much more observing than I am.

As I look at the matter, BS and BT are worked together, BT depending on BS. I think you have to revise the exhibit for this reason. Let's go back over it again. I permitted a calculation to be filed on what Winckler & Smith would earn, following this cross-examination, and you cross-examined and you were given the right to make a computation based on your figures, or the figures you brought out. I am not going to hold you too closely as to whether you brought those figures out in cross, or not, as long as your computation is directed to that issue that we meet, what would Winckler & Smith earn, from their standpoint, on the basis of the 12,000 tons added to their other production.

Now, you have in here this oil return that we discussed the other day.

You are entitled to show by other evidence that had Sunkist given 12,000 tons to Winckler & Smith they wouldn't [2768] have got as much from the oil as they got if they gave it to TreeSweet. That is your point. But you have got it worked in here, and it doesn't match up with the other computation, and it injects this other issue in from Sunkist's standpoint, how much would Sunkist have gotten. And I don't think that is the way to do it, in view of what happened.

I was going to permit you to make the compilation in contradiction to the one the plaintiff made.

I have been over this pretty carefully, and as I read it, unless I am wrong, it involves a figure here which properly belongs in the evidence somewhere, but I don't think it belongs as part of this exhibit.

Mr. Strachan: Your Honor, this exhibit isn't directed toward rebuttal of Hodge's computation alone. I brought out, I thought, in cross-examination of Mr. Hodge, what we regarded as matters which have been ignored, overlooked, or understated.

This exhibit, instead, is predicated on what we compute would have been gain or loss to Winckler had he obtained his fruit and processed it with the same allowances, and returned to Sunkist the same dollar value for the fruit which the TreeSweet contract yielded.

I would like to look the exhibit over and see if there is improvement I can make in the form of it.

Basically, I think we will come out with the same result [2769] because accepting for the sake of the argument the premises that Mr. Dixon supposes, that is, that what Sunkist got in return from juice and from oil was the cost of fruit, and your Honor in recognition of that proposition required that the two exhibits analyzing the Silzle and the TreeSweet contracts show the aggregate of those returns, so accepting the assumption that what was returned was cost of fruit, we take the position that if the Winckler-Smith operation were to be conducted with the same allowances, under the same conditions,

as the TreeSweet arrangement was performed, the cost of fruit should be the same, and that we should be under no obligation to accept $7.00 a ton, or thereabouts, less from Mr. Winckler's contract than we should from TreeSweet, particularly when Mr. Winckler's claim is that he is entitled to have the same allowances.

As I say, I will look the exhibit over and see if I can cast it——

The Court: You are mixing the two things together. It is true on the computations of Silzle and TreeSweet contracts, which were different from a mythical ton proposition—now, we have two or three different propositions here—it is true on those when plaintiff was offering a computation as to what fruit was costing TreeSweet and Silzle, we made them compute the oil proposition, that is right. Now, the mythical ton proposition is another problem. This case is [2770] confusing enough without adding to any other confusion, and it sort of looks in this exhibit, which speaks of the 12,000 tons, that this exhibit is slanted towards the Silzle exhibit, the TreeSweet exhibit, the mythical 12,000 tons, and the further contention that Sunkist was right in not giving any oranges to Winckler & Smith, because they would have got a better oil return from TreeSweet than from Winckler & Smith.

But we had two days' cross-examination on a mythical ton computation, as a result of which the court permitted a written computation of that to be made, and I will permit you to make a computation

on 12,000 mythical tons, but the oil doesn't belong in there.

You may also put your proof on that there would have been a bigger return from TreeSweet for oil. But I can't be convinced why oil enters into this 12,000 mythical tons. And your title is the Projected Results of Operations. You start out and you get a cost of juice product of $170,000. Now, to make up your total here, you use three items. You use this oil figure of $70,000, you use a processing figure, and then you use selling expense.

As far as your selling expense, if you want to draw a computation where you took 8 per cent and Hodge took 3, have your accountant explain why you took 8; if you want to explain why you took a certain processing cost, rather than another cost, I have no trouble following that. I have trouble [2771] following what Winckler & Smith would have made as a total profit or loss, had it had 12,000 additional tons. Can you explain it?

Mr. Strachan: I think the difference between us is this. When our accountant is through explaining how he prepared that, it will appear that for the purpose of this exhibit he has assumed that the cost of the fruit to the processor under the TreeSweet contract was the aggregate of the oil returned and the return from the sale of juice——

The Court: Wait just a minute. Aggregate cost to the processor?

Mr. Strachan: What he had to pay the seller was the combination of those two.

The Court: He had to pay what juice he got and what oil he got?

Mr. Strachan: The total cost of the fruit under the TreeSweet contract was, say, $25, because that was made up of $10 worth of oil and $15 return on juice.

Now, anybody who wants to have that same deal should have to pay the same price for fruit.

That is basically what our accountant has assumed in preparing those two exhibits.

It may be that it is not reflected as clearly as it could be, and in that event I would like to see if we can't improve on the statement of the thing, so that it doesn't [2772] confuse your Honor, or the jury, or me, or anybody else.

I think I know what your Honor has in mind and I will review the whole problem over the week end.

The Court: You review it.

It just sort of sticks out like a sore hand that you are injecting something in there that doesn't properly belong, if this is the computation which I said you could file in connection with the 12,000 mythical tons.

You are entitled to put a witness on and develop your figures on oil return, make your showing that from your accountant's figures that had you done business with Winckler & Smith you would have got less oil returned.

I would just prefer, unless it belongs in here, that it wouldn't get mixed up with two exhibits that were permitted in connection with the 12,000 mythical tons following two days of cross-examination.

Mr. Strachan: Your Honor, it seems to me that perhaps this is the difference between us: You say we are mixing two things up, because we deal with the juice return and the oil return as an aggregate. From our point of view, the thing was improperly separated in Mr. Hodge's computation. We have a single yield for the whole fruit, and he used only a part of the picture.

The Court: It can be resolved by a matter of logic. If we start to follow it up that way, of course I may wind up on [2773] your side or you may wind up on mine. But we start out with the premise of this experiment, and the premise and all this cross-examination, all this time was spent on this problem, suppose Winckler & Smith had got 12,000 tons of fruit from Sunkist on the same terms that Tree-Sweet got it, during that year, added to their profit, would they have a loss or profit, what would they have had. So you say we start with the TreeSweet contract. The TreeSweet contract gave certain allowances, and so forth, down the line. Now, it seems to me that where you and I part company is this: If we also assume TreeSweet's facilities in extracting oil, maybe we get this result. But I don't see how we can assume TreeSweet's facilities. We have got to assume Winckler & Smith's facilities, which weren't as efficient, from what I have heard, as TreeSweet's in extracting oil.

Now, let's leave out the other exhibits, TreeSweet and Silzle, as to what fruit would have cost under those contracts. Under the TreeSweet contract the oranges were delivered to TreeSweet, and under our

supposition to Winckler & Smith, the oranges remaining under the title of Sunkist. Therefore, the juice is extracted, and we arrive at a figure for the juice. The oil is extracted, and the oil belongs to Sunkist and goes back to Sunkist. Now, when we made the comparison between Silzle and the TreeSweet contracts with plaintiff's set-up, we took the oil because there we were [2774] comparing what fruit would cost, and the plaintiff couldn't merely say, "I will just take the cost of the juice," because in comparison with the $40 price, if the plaintiff had paid the $40, it would have got the whole orange and would have been entitled to the juice and the oil. So to compare with the $40 figure, in fairness, we had to say, "You can't just take the cost of the juice, because if you got the oranges, under the TreeSweet arrangement you would get a certain figure that represents the cost of the juice, and you get another figure which represents the return of the oil, but you don't get to keep the oil," so we had to figure the oil in with the juice when we are comparing with the $40 price, for the reason that when the plaintiff bought the $40 oranges he got the works, he got the orange, the seed, the pulp, the whole business, and when you compare that with the TreeSweet and Silzle, he didn't get the oil, so we had to make a comparison.

Now, we are not here comparing, in the 12,000 mythical tons, we are not comparing anything with $40 oranges, we are merely saying what would plaintiff have made had it had the 12,000 tons of oranges under the TreeSweet contract.

It is true we are calling the same contract into play, but the comparison we are trying to make is a different one. So when we get to adding this one to Winckler & Smith production, we figure out what this juice would have cost them, and [2775] we know they have to give the oil back to Sunkist, but since we are not comparing with $40 oranges, we don't have this problem.

So it is true that there is this differential in return, but it is not related to this problem.

I may have gotten off the track there, but I think I have got my finger on the difference if you analyze it. I think we can see it. I think the difference is when we compare the Silzle contract and TreeSweet contract with the $40 oranges—that is what plaintiff was trying to do, they are trying to say we had to pay $40 for oranges, look at what TreeSweet and Silzle had to pay—so there was a comparison being made between the $40 a ton oranges, how much per ton was Silzle and TreeSweet paying.

When we get to the 12,000 tons we have got to put that behind us, we are not now making any comparison with $40 oranges; we are merely saying, supposing we had a contract for 12,000 tons of oranges under TreeSweet's arrangement, we take the TreeSweet contract as to allowances and various things, and when we come down to oil we then say the oil has to go back to Sunkist. So, however it works out on Winckler & Smith's figures on oil. But we don't take Winckler & Smith's figures on oil. [2776]

Now, your point comes in, not in this comparison,

but later, where you say Sunkist wouldn't have sold the oranges to Winckler & Smith because TreeSweet could make a lot more oil for them than Winckler & Smith. I don't think it belongs in here. I think if you try to analyze that, you may see what I am thinking about.

Mr. Strachan: I will certainly try. I will say this, your Honor. I am not bothered by the computation, with the way we have made it, but I am bothered by the fact that you are bothered by it, and with this transcript I would like to go over the thing again and see if there should be some changes made.

The Court: I will try to work on it myself, but I think at least from my own thinking, I think I have got my finger on it now in that one sheet where we added oil, and we were right when we added the oil, this is, because we were talking about the $40 oranges.

We say, "Winckler & Smith, if you pay $40 for your oranges, you have the juice and the whole business.

"If you are going to compare that to TreeSweet and Silzle oranges, you have also got take into account the oil."

This is not that kind of comparison.

Mr. Strachan: I don't want to chew over old fat, but it seems to me plaintiff's basic position is, in the TreeSweet computation, if given fruit at the same price they let [2777] TreeSweet obtain the fruit, we would have made money.

TreeSweet obtained fruit at a $25 price, paid part

in return of oil in kind and part in proceeds of sale of juice in kind.

So we start computing hypothetical results and the 12,000-ton deal would have resulted in certain things had Winckler & Smith gone through with it. Given the $25 fruit made up of two parts, I don't care whether they pay it in oil or whether they pay it in some other way, but they have got to pay the $25 for fruit if they want the TreeSweet deal, and when you get through with that, they come up with a loss.

The Court: Well, the result may be the same but, of course, neither plaintiff's computation nor yours is made on the basis of the $29 fruit. You didn't use that figure in making the computation.

Mr. Strachan: Maybe I will have to do that.

The Court: You took allowances and worked on it that way. Maybe the result comes out the same and maybe it doesn't. As you state it, it sounds plausible, but the fact remains that although you state it that way, that isn't the way it was done. You didn't take $29 fruit to figure that out. You went at it the other way. Maybe it comes out the same and maybe it doesn't.

Mr. Dixon: If the court please, I have been listening to this discussion. I might say at the outset that after I [2778] had had a chance to examine this proposed exhibit, before any comments were made by your Honor or anything else, I had put a line on page 2 between the I and the H, and I still intend to object if this exhibit is offered on that basis, that the H should be removed from the exhibit,

The Court: Well, it goes out or stays in largely on the basis of the logic of this thing, and the logic of the comparison. If it belongs in there to make a comparison with the plaintiff's calculations, that is one thing. If it doesn't, that is another.

It, however, may be calculated in some other calculation.

Mr. Dixon: Yes.

The Court: In which event, it shouldn't be in here to add confusion.

Mr. Dixon: But there are certain things necessary to make that admissible in this case that I think the defendants would have to first show, your Honor, insofar as the theory under which this is being offered is concerned. I am not going to state what they are at this time. That is up to them to determine. [2779]

* * *

JOHN A. LYNCH

called as a witness by the defendants herein having been heretofore duly sworn was examined and testified further as follows:

Cross-Examination

By Mr. Dixon:

Q. Mr. Lynch I believe you testified that you were first called into this case in May of last year; is that correct? A. Approximately.

Q. And you have been working on the books of the plaintiff corporation ever since that time, have you? A. That is correct.

(Testimony of John A. Lynch.)

Q. What instructions did you receive from Mr. Hurd when you were called into this case? [2783]

A. The only instructions we received were to examine the books and records that were presented to us and make an examination and prepare financial statements in accordance with sound accounting principles.

Q. Were any copies of the plaintiff's books turned over to you by anyone from the defendant at that time? A. Yes, sir.

Q. So that from May of last year you have had complete access, have you, to the accounting books and records of the plaintiff corporation?

A. That is correct.

Q. Now, had you ever done any work for Sunkist prior to this case? A. No, I had not.

Q. You have never examined their books or done any accounting work in connection with the preparation of any returns for Sunkist? A. No, sir.

Q. Or any other citrus processing company?

A. No, sir.

Q. Now, I think you said that because of the magnitude of the assignment that you took on in May you had to have Mr. Regan help you.

A. Mr. Regan is an employee of mine. He works on all my cases. [2784]

Q. Is he the only one who has worked on this, shall we say audit? A. No, sir.

Q. Who else has been working with you in addition to Mr. Regan on the examination of the books of the plaintiff?

(Testimony of John A. Lynch.)

A. Well, I had Miss Ruth McNamara.

Q. Who is she?

A. She is a senior accountant employed by me for the last ten years.

Q. Where does she reside?

A. She resides in Illinois, Chicago.

Q. Has she been out here working with you on this case?

A. She has been out here at the time we were to have access to additional records, and I don't recall the duration of her visit, but I believe it was short, about a week or two weeks. I also had Mr. John R. Christoph work on this case. [2785]

Q. Who is he?

A. He is a senior accountant who has been employed with me for about six years, seven years.

Q. What duties did you assign to these two persons that you just mentioned?

A. I had one other working on it, too.

Q. Let's have his name, too.

A. I had Mr. James A. Lynch, who also resides in Illinois, perform on this engagement.

Q. Anyone else?

A. No; I believe that would include everyone except the stenographers.

Q. That makes a total of five people, including yourself, from your firm that worked on these books?

A. That is correct.

Q. Since last May?

A. Well, not continuously. We had access to them since last May. We had our regular work to perform.

(Testimony of John A. Lynch.)

Q. You have been out here a good part of that time since then, haven't you?

A. No, sir. I came out on Christmas Day.

Q. Is that the first time you came out here?

A. That is correct.

Q. Was anyone else from your firm out here before Christmas? [2786] A. Yes.

Q. Who? A. Mr. Regan.

Q. Who else?

A. Well, as I stated before, I had Miss McNamara come out to examine some records, and with her was Jim Lynch. They were here approximately a week or 10 days.

Q. Did you have a discussion with anyone from Sunkist about the records that were turned over to you in May of last year which related to the books of the plaintiff? A. No, I did not.

Q. Do you know whether any work had been done previous to that time by any other accountants in connection with the examination of the books of the plaintiff? A. Not to my knowledge, no, sir.

The Clerk: May I interrupt? Didn't you mean, instead of E and F, didn't you mean BE and BF?

Mr. Dixon: Yes. I am sorry.

Q. (By Mr. Dixon): Would you mind telling the jury how much compensation your firm has received for the work done in connection with the examination of the plaintiff's books since you were assigned or took over the work in connection with this case? A. No, I would not mind.

Q. You might tell what it was. [2787]

(Testimony of John A. Lynch.)

A. As of the date I left Chicago we had not received any, although I had made a billing at November 30th. I understand that subsequent to that time the bill has been paid. The billing, as I recall it, including the traveling expense and subsistence, for——

Q. Now, I am just concerned at the moment with how much your firm has been paid for the five employees that you mentioned.

A. That is what I am getting at. Our bill, as I recall, included all traveling and subsistence.

Q. Did you break it down?

A. No. That is what I am getting at. The bill just was a flat bill including all those, cumulative, and if I recall it was approximately $39,000.

Q. That was last December?

A. That is correct.

Q. As of December 1st?

A. That is correct.

Q. Of course you and Mr. Regan, and others from your office, have been working on the matter substantially continuously since that time?

A. Mr. Regan has been devoting his full time to it. I have, also, since Christmas.

Q. But you haven't billed them for that yet?

A. No. [2788]

Q. Can you tell the jury how much of that amount represents expenses incurred, travel and hotel here in Los Angeles?

A. It would have to be an approximation.

Q. That is all I want, an approximation.

(Testimony of John A. Lynch.)

A. About $4,000.

Q. So that $35,000 represents the payment to your firm for work done up to December 1st?

A. That would be about it.

Q. And you have not billed them for any services or expenses since that time?

A. That is correct.

Q. Mr. Lynch, most of your work before you went into business for yourself—that was back in 1945, wasn't it? A. Yes.

Q. Was in connection with the tax matters, accounting and tax matters, was it not, while you were with the Bureau?

A. I had experience with a public accounting firm prior to that. [2789]

Q. Yes. I recall that, but you were with the government, were you not? A. That's right.

Q. The Bureau of Internal Revenue.

A. Right.

Q. For how many years?

A. Approximately three.

Q. And most of that was investigating returns to determine whether some fraudulent return was made or something was wrong with the return to recover some amount to the government, is that correct?

A. Well, income tax examinations, and they were not fraudulent returns, however.

Q. They were audited?

A. Auditing income tax returns, corporation income tax returns.

Q. In connection with your work with the Bu-

(Testimony of John A. Lynch.)

reau and going into renegotiation work, the contracts, that is, during the war, was that about the same type of work you were doing, to determine whether some costs or something had been blown up, shall we say?

A. Well, I wouldn't define it as being that type of investigation. It was merely the isolation of costs incurred by a corporation on a specific contract which they were performing for the government, and the allocation of overhead [2790] and burden to those contracts.

Q. When you took over this large assignment, you called magnitude assignment, I believe, you assumed one of the jobs you took on was to find something wrong with the books of the plaintiff from an accounting point of view, insofar as your opinion was concerned?

A. Not necessarily. Otherwise, we would have delved into the vouchers and the support for such vouchers.

Q. Didn't you do that in some instances in your audit?

A. Only since we have been here and had access, since December 8.

Q. But you did do that?

A. From May until December, until Christmas, we had never probed into the support for any spread which was made. We just accepted it as such.

Q. You mean since December you have, however, done that?

A. Since December out here, the books and rec-

(Testimony of John A. Lynch.)

ords were made—when the supporting records were made available, we have analyzed certain accounts and tested the support for the charges which were made in the books of account.

Q. One of your assignments and one of your instructions, was it not, was to check and see what Mr. Winckler as president of this company had received as salary and other items you testified to last [2791] Friday?

A. No assignment, no specific instructions to make any particular investigation. We have had experience in this type work before.

Q. This type of work? What do you mean by "this type of work"? A. Antitrust suits.

Q. An antitrust suit from an accounting point of view is no different from any other suit, is it? Your job as an accountant, Mr. Lynch, was, was it not, to go in here and find something wrong with these books?

A. No, sir. We had no such instructions.

Q. Then were your instructions to make a complete audit, and I mean complete audit of the books of the company to see whether you could find anything wrong with them?

A. We were advised to make the proper financial statements with the information we had available.

Q. And in connection therewith, you did finally go into such things as how much Mr. Winckler had received as president of the company, and so forth?

A. Well, the examination of the minutes and the

(Testimony of John A. Lynch.)

manner in which these transactions were reflected led us to believe we should go into those items.

Q. I believe you testified here last Friday concerning some of those statements.

A. That is correct. [2792]

Q. And checks made to Mr. Winckler?

A. That is correct.

Q. And you fully ran those checks down and satisfied yourself that those items represented what you testified to last Friday? A. No, sir.

Q. On the books of the company.

A. No, sir. We did not have those checks. They had been pulled and they were not available for our examination.

Q. I believe you stated to the jury last Friday that in going over the amount Mr. Winckler received, I think, in addition to salary, you mentioned some check for $340 charged to some rental account, is that correct? A. That is correct.

Q. How did you determine whether that amount was charged to rent?

A. The accounts, the books of account, the cash disbursements book reflected the check, the date, the number, the amount, the account to which it was charged.

Q. Yes.

A. We had no access to the voucher.

Q. You had the check, didn't you?

A. No, sir.

Q. The check number? A. No, sir. [2793]

Q. You told the jury what it was.

(Testimony of John A. Lynch.)

A. The check number is indicated in chronological order on your cash disbursements book. It is very easy to isolate that item.

Q. This check of $340 that you were talking about last Friday as being charged to some rental account, while the check was payable to Mr. Winckler, you had that check, didn't you?

A. No, sir.

Q. You did not? A. No, sir.

Q. In other words, you want this jury to believe that your staff didn't have access to all these checks?

A. I hope they believe it. We did not have them.

Q. Then how was it you determined the $340 was paid to Mr. Winckler and charged to rent?

A. Well, I will explain that.

The Court: Let's not have a misunderstanding.

The Witness: The cash disbursements book——

The Court: Just a minute. I don't think the witness said it was charged to rent. Maybe I am in error.

The Witness: Yes, I did.

The Court: I think he said it was charged to Winckler's account but there was an indication it was for rent.

The Witness: No, sir, your Honor. I said it was charged [2794] to rent.

The Court: A rent account?

The Witness: That's right.

The Court: And not charged to his account?

The Witness: That's right.

The Court: Then I am mistaken. The witness has

(Testimony of John A. Lynch.)

straightened me out, Mr. Dixon. That is my error. I thought you were putting words in his mouth that he hadn't said.

Q. (By Mr. Dixon): You stated that was for the year ending January 31, 1950. I have $340 charged to rent.

"The Court: What was that?

"The Witness: That was check No. 4472 on June 9, 1949, to Mr. N. J. Winckler, charged to rent.

"The Court: Just rent?

"The Witness: That is correct."

Now, I want you to tell this jury, Mr. Lynch, how you determined that this $340 was charged to any rental account.

A. All right. I took the cash disbursements books, and your cash disbursements book records in chronological order and in numerical sequence each check that is issued by the company, the date in the first column, the number of the check, the payee of the check, the credit to the bank, and then the spread to which account it was charged. [2795]

On Winckler & Smith's books, because of the number of those checks, they got a sheet and prepared a recap and entered those checks in toto. We were furnished with the recap sheets or cash distribution sheets, as they refer to them, and such items were reflected there, and the accounts to which they were charged were reflected thereon without access to the checks or vouchers or anything. [2796]

Q. Did you ask, when you saw what you thought

(Testimony of John A. Lynch.)

was rent, or what you said was rent, for the voucher? Did you check your own investigation?

A. Yes, sir.

Q. And what did the voucher show on this check No. 4472, Mr. Lynch?

A. The vouchers and check were not presented to us.

Q. I asked if you asked for the voucher?

A. I didn't see them.

Q. Did you ask for them? A. Yes, sir.

Q. Were you refused them?

A. No, sir, we weren't refused them.

Q. Did you get them? A. No, sir.

Q. Why not?

A. As I understand it, Mr. Smith didn't know where they were.

The Court: Let's identify Smith. Who is Smith?

The Witness: Mr. J. A. Smith.

The Court: Who is he?

The Witness: He was an accountant for Mr. Walker, I believe was his title.

Q. (By Mr. Dixon): He has been working with you and furnishing you material that you asked for? [2797]

A. No, he wasn't working with us. We asked him for anything.

Q. I mean furnishing with whatever you asked for? A. That is correct.

Q. In connection with this audit that you were making? A. That is correct.

(Testimony of John A. Lynch.)

Q. In connection with the books of the company there is a key system, is there not, numbers for various accounts, which you had access to?

A. Well, the ledger accounts have a number on them. Is that what you are referring to?

Q. Yes. A. Code of accounts.

Q. You had the code account to the rental account of the corporation, didn't you?

A. The rental account would be a code number.

Q. Yes. A. That is correct.

Q. Did you run that through to see whether the $340 represented by check 4472 was charged to any rental account of the corporation?

A. Yes, sir.

Q. And what did you find?

A. It was charged to rent.

Q. It was? [2798]

A. Yes; the same with Mr. Wallenstein's $1500.

Q. And you are certain of that?

A. Fairly certain.

Q. Are you certain, Mr. Lynch? You made the statement here. I want you to now state to the jury that that is a fact insofar as you are concerned.

A. That is a fact, yes, sir.

Q. All right.

Mr. Dixon: Mark this for identification, please.

The Clerk: Plaintiffs' Exhibit 79.

The Court: 79 marked.

(The exhibit referred to was marked Plaintiff's Exhibit 79 for identification.)

(Testimony of John A. Lynch.)

Mr. Strachan: Has the rule broken down that we are supposed to show documents to opposing counsel?

The Court: No, it has not.

Q. (By Mr. Dixon): I hand you, Mr. Lynch, what has been marked as Plaintiffs' Exhibit 79, the same being a copy of check No. 4472, with attached voucher; and ask you to state to the jury whether you know what that is in connection with the auditing of the books of this company?

A. I have never seen this before, but this is a voucher check of Winckler & Smith Citrus Products Company, No. 4472, dated June 9, 1949.

Q. Will you tell the jury what it shows on the voucher, [2799] which is attached to the copy of this check?

A. It shows on the voucher, which is a duplicate of the original check, an amount payable to N. J. Winckler $340, with the detail, description: General expenses for the month of April, parking, telephone, entertainment, et cetera, $50. Car expense for April $120. General expenses for the month of May, parking, telephone, et cetera $50. Car expense for May $120. Total $340.

This voucher reflects the account charged was account 739, $100, and account 628, $240.

Q. From your key to the account books of this company can you tell this jury what No. 739 account is?

A. I believe so. It is an administrative account. Miscellaneous expenses.

(Testimony of John A. Lynch.)

Q. And that isn't a rental account, is it?

A. No, it isn't.

Q. Will you tell the jury what account 628 is?

A. 628 is automobile expense, selling.

Q. Selling? A. Right

Q. Do you find anything anywhere on Plaintiffs' Exhibit 79 which indicates that any amount of this check was charged to rent or the rental account of the company in any way?

A. Not on that voucher there.

Q. All right. Now, you still insist, do [2800] you——

A. I would like to see the cash disbursement book.

Q. We can furnish that to you. Glad to do it.

A. All right.

Mr. Dixon: By the way, plaintiff offers 79 in evidence, your Honor.

Mr. Strachan: I will ask that ruling be reserved until after redirect.

The Court: I will reserve ruling.

Q. (By Mr. Dixon): I will hand you what you have requested, Mr. Lynch, the cash disbursement book; do you find the $340 right at the top, check 4472, dated June 9th? A. Yes.

Q. Will you state to the jury whether you find any rental reference there?

A. No. It reflects the proper posting and the proper distribution. I was in error in putting it in the rent. It should have been included in auto expense and miscellaneous expense, as recorded.

(Testimony of John A. Lynch.)

The net effect, however, is still zero. The check was drawn to Mr. Winckler as I testified.

Q. That shows on its face, there is no question about that.

A. My classification was just erroneous; to rent, instead of auto expense.

Q. You now want to change your story, do you, Mr. [2801] Lynch, concerning this $340 disbursement that you said was charged to, somehow, rent, and Mr. Winckler got the $340?

A. He got the $340.

Q. And he paid his rent with it, is that what you want this jury to understand?

A. I didn't testify to that. I just said the account that was charged was rent. The only difference in my testimony is the account charged is automobile expenses and miscellaneous expense.

He has got the $340.

Q. In any event, you were in error, is that correct?

A. On the classification nature of the expenditure.

Q. Is that the only place that you think you have been in error in this audit?

A. I would say that's all.

Q. By the way, when you started to go over the books here for the year ending January 31, 1950, which was the first year of operations after the plaintiff came out of the Chapter XI proceedings, it is a fact, is it not, Mr. Lynch, that at that time the only assets which the company had, that is the plaintiff had, was the plant and equipment contained

(Testimony of John A. Lynch.)

therein, and the lease containing the option to purchase it; that is a fact, is it not?

A. If they owned the land, plant and equipment, they wouldn't have an option to buy their own land, plant and [2802] equipment.

Q. Did it have any cash in the bank?

A. It had no cash, as I recall. It had an inventory of cans, labels, and containers of roughly $22,000. It had a bona fide account receivable from Mr. Winckler of $38,140.33. It had——

Q. It didn't have any cash in the bank did it?

A. No, sir.

Q. Did you make it your business, in connection with this audit, to find out where they got any cash to run this business until they started to get some money from the products they sold?

A. Yes, sir.

Q. What did you find?

A. Well, we found that they sold the plant, land and building for $50,000.

You asked me where they got the cash to start after reorganization.

They got $50,000, of which $40,000 went for the plan of arrangement and $10,000 was paid into the corporation.

Q. No. Did you check that, Mr. Lynch, to see whether that was in connection with the confirmation of the sale approved by this court, and as part of the reorganization of this corporation in 1949?

A. I definitely did, and there was no such plan—— [2803]

(Testimony of John A. Lynch.)

Q. You know as a fact——

Mr. Strachan: I think the witness ought to have an opportunity to finish his answer.

The Court: Finish your answer.

The Witness: There was no such plan recorded in this court. The plan of modification merely stated that $40,000 should be paid to the trustee. And such $40,000 was to discharge the obligations of the reorganization.

The second plan of arrangement did not embrace the sale of the plant. The third one did. It was up to the debtor corporation to raise that money any way they saw fit. And our audit reflected that as of February 14, 1949, the third plan of arrangement was filed with this court. And, in fact, the court order revested in the debtor corporation all the land, buildings, and equipment, free and clear of all encumbrances. And then they were sold on April 3, 1949.

Q. Do you mean the court approved the sale?

A. No, the court did not approve any sale. The court just approved the plan of modification, if they came up with $40,000. How they get it, that is their business. The court had nothing to do with the sale of the plant. [2804]

Q. I see. Well, just so the record may be clear, Mr. Lynch, you want this jury to believe that while the creditors weren't paid in full out of the reorganization plan, that the corporation itself, the plaintiff here, ultimately got and used in its business, after it resumed operations following the confirma-

(Testimony of John A. Lynch.)

tion of the plan of reorganization and sale of assets——

A. I certainly do want them to believe that and that is in the court record.

Q. All right. So that some of this money, then, went to the corporation, not to the creditors, pursuant to the court's order?

A. $10,000 of the money went to the corporation net of expenses. I believe they got a check for $7,300 after expenses.

Q. Did you find out whether this corporation was loaned any money by the stockholders after it resumed operations with which to carry on its operations?

A. They were loaned money by Rubin, Wallenstein and Parvin, if I recall, or Rubin and Parvin, upon the sale of the stock of Mr. Winckler which was in the $38,000.

Q. And in connection therewith and your audit, the preliminary bills after this company resumed operations following the reorganization in 1949 were either paid for by somebody associated with the company and subsequent reimbursement, [2805] or paid for by the company itself, that is true, isn't it?

A. I would like the question repeated.

Q. All right.

The Court: Read the question.

(Question read.)

The Witness: The preliminary bills were paid out of the proceeds of the assets, the $7,000 received on March 4, 1949.

(Testimony of John A. Lynch.)

Q. (By Mr. Dixon): Well, what about this $21.33 that you testified here last Friday Mr. Winckler got from this company that was charged to gas, I think you said? A. To gas?

Q. To gas, yes.

A. Well, what about it, sir?

Q. Do you want this jury to believe that the plaintiff was paying Mr. Winckler's gas bill with this amount?

A. I happen to have made an analysis of the Union Oil Company yesterday.

Q. Will you kindly answer my question?

A. And they paid his gas bill or at least the gas purchased on Mr. and Mrs. Winckler's credit card for a year.

Q. I am speaking of——

The Court: Wait a minute. You are both talking about gas. Gas might mean something piped in by pipe and it might mean gasoline. Let's be more specific, both of you. [2806]

Mr. Dixon: I thought I had, your Honor. I thank you for your suggestion.

Q. I think you testified last Friday, Mr. Lynch, that included in the items you said Mr. Winckler was paid or got money for was, "I have a total of $21.33 charged to gas." Did you find out whether that was the personal gas bill of Mr. Winckler?

A. No. I had no voucher available at that time to make any analysis. That is the way it was recorded on the books.

(Testimony of John A. Lynch.)

Q. What did you want this jury to believe when you testified with reference to $21.33 being paid to Mr. Winckler for gas?

A. I wanted that jury to believe, or this jury to believe that all these checks that I quoted were made payable to N. J. Winckler and they were so made payable, according to the books, and that the charges were in substance what I testified to. My statement that the $340 was in there may have been erroneous, but it was still charged into the books and records and he got the money. That only included checks payable to him. Any $25 a week account out of petty cash for L. A. expenses every week were not in there bec se they were not checks.

Q. Mr. Lynch, I am asking you specifically with reference to your testimony concerning this $21.33 that you testified [2807] to as being charged to gas?

A. Yes, sir.

Q. Will you tell the jury as an auditor what you wanted this jury to believe that $21.33 was?

The Court: He has answered that question. You asked it before. Did the books that you picked that up from use the word gas or use the word gasoline?

The Witness: Well, your Honor, if I may see the cash disbursement book again, I can refer to the exact title.

The Court: The cash disbursement book?

The Witness: No. 4415.

Mr. Dixon: Will you mark this for identification next in order, please?

(Testimony of John A. Lynch.)

The Court: Exhibit 80 for identification.

(The exhibit referred to was marked Plaintiff's Exhibit No. 80 for identification.)

Mr. Dixon: Let the record show the witness is being shown the cash book he requested.

The Witness: Account No. 523.

The Court: In other words, in the books that expense was charged to account 523?

The Witness: That is correct.

The Court: What is that account?

The Witness: Gas, according to us, 523 is gas.

The Court: Is that gas or gasoline? [2808]

The Witness: Well, your Honor, that is a transcript of the account as reflected in the books. They just have it headed gas.

The Court: Did you check that account to see what items were in that account, whether they are checks payable to oil companies generally or people who supply gas for house and plant?

The Witness: No, we didn't check the account because we had no voucher.

The Court: You had the ledger, did you?

The Witness: We just had the ledger and the cash disbursement book and the monthly journal entries, together with some work papers prepared by the company.

The Court: Then you can't tell me.

The Witness: No, sir.

Q. (By Mr. Dixon): I hand you what has been marked Plaintiff's Exhibit 80 for identification, the

(Testimony of John A. Lynch.)

same being check No. 4415, dated May 4, 1949, payable to Nicholas J. Winckler in the amount of $21.33, and voucher attached thereto, and ask you to tell the jury what the voucher indicates.

A. The voucher is a copy of a check and indicates that on May 4, a check was made payable to Nicholas J. Winckler for $21.33, and charged to account for gas, 523. The voucher itself reads: "For gas bill paid to Southern Counties Gas [2809] company."

Q. And is the bill from the gas company attached thereto, some of that amount or the whole amount? A. That is correct, it is attached.

Q. So that this was not in payment of any gas bill incurred by Mr. Winckler personally, was it?

A. No, sir. I did not so testify, either.

The Court: Who was the bill to?

The Witness: Winckler & Smith.

The Court: You say the gas bill is attached?

The Witness: Winckler & Smith, your Honor.

The Court: The corporation?

The Witness: For gas, sir.

The Court: All right. That solves the question. It is fluid gas and not gasoline.

The Witness: That is correct.

The Court: And the billing was to the corporation.

Mr. Dixon: The plaintiff offers 80 in evidence.

Mr. Strachan: I will ask that ruling be reserved.

The Court: It may be reserved.

Q. (By Mr. Dixon: You testified last Friday

(Testimony of John A. Lynch.)

that you had a check for $249.90 charged to other ingredients used. A. That is correct.

Q. Can you now tell the jury what that item represented? [2810]

A. No. I told you I had no vouchers to run these down. They were just a recap of checks made payable to Nicholas J. Winckler.

Q. You never asked for the vouchers to determine what they were actually for?

A. We asked for the vouchers, and all records were supposed to have been turned over to us. We didn't have them at the time.

Q. Did you ever ask for these vouchers and were refused them, Mr. Lynch, in making this check and preparing yourself for testimony that you gave here last Friday with reference to these items?

The Court: Now, wait. By that you mean these specific vouchers?

Mr. Dixon: Yes.

The Court: The two you have marked for identification?

Mr. Dixon: That I have referred to.

The Witness: As I understand, all vouchers, all writings, all supporting records, all books and records, all journal entries, were requested by us. We never got them all. We got the books of account, we got the journal entries, we got the monthly work sheets. We did not have the vouchers which you are referring to there. They may have been made available to us since this trial started.

(Testimony of John A. Lynch.)

but this is an accumulation of work for ten months. It is impossible in a [2811] short time to check all those items after we get the information, if it was made available.

Q. (By Mr. Dixon): Mr. Lynch, I am asking you, before you testified concerning the check of $340 that you said was charged to rent and the check for $21.33 which you said was charged to gas, whether you followed through to determine whether those items were for reimbursement to Mr. Winckler for amounts actually paid by him at the time this corporation resumed business and for which he was being reimbursed.

A. I so testified we had not run those down. They were merely checks to Mr. Winckler for allowances. We were not passing on whether they were legitimate or not.

The Court: The specific question was asked, which you never have answered——

Mr. Dixon: I was going to ask that again, your Honor.

The Court: Just a minute, Did you ever ask specifically for these vouchers involved in Exhibits 79 and 80?

The Witness: Not specifically, your Honor. We asked for over-all records and we didn't get them. I did not ask specifically for this account or this gas bill, or Winckler's accounts or Wallenstein's accounts.

The Court: Let me say this.

The Witness: Excuse me. We did ask for these

(Testimony of John A. Lynch.)

specific checks for Winckler, your Honor, and we didn't get them. We did ask for them. [2812]

The Court: I don't know whether we should go into that or not. As the jury knows, there has been a lot of discovery in this case, but this corporation was under the control of Walker as trustee and during a good part of this time it was not actively in business.

This man Smith apparently, from the testimony, was some auditor hired by Walker. The problem of both sides was in trying to find access to the material. If you have a going business where you have got a bunch of files and secretaries and you want something, you can put your hand on it. When you haven't got a going business and you have got a bunch of files stacked around somewhere, trying to go through those files is like trying to find a needle in a haystack.

This is said partly in justification of the witness here and his problem, and partly in justification of the plaintiffs and their obligation to supply material. It has nothing to do with the merits of this case except that we don't want to have any confusion in the jury's mind about what went on.

Both sides were as cooperative as they could be under the facts of this case in making material available one to the other. I think that is a fair statement.

But under the conditions as they were presented problems were present. It presented a problem to the defendants, because instead of being able to go

(Testimony of John A. Lynch.)

to an organization [2813] that was a going business and saying, "Where do you find this?" that was not available. They had to go to Mr. Walker and he had in turn to refer to some auditor who apparently had never worked for the company, as I understand the situation, but had been hired by Walker, and try to find the material.

It presented a problem to the plaintiffs, because when they were asked for material, they had the same problem, and all they could do was say, "Here is some material. We don't know any more than you do where it is."

One time later in the case a large amount of this material was moved over to some room nearby the defendants, but again that didn't any more solve the problem, because you can imagine what the books and records of a company would be like after it had gone out of business.

All I am trying to say is that, No. 1, as far as the counsel in this case are concerned, I think both sides have been cooperative. Under the circumstances of the case the plaintiff had problems and the defendants had problems.

The Witness: May I add to my statement, your Honor?

The Court: Yes.

The Witness: With reference to these specific items Mr. Dixon is questioning, we specifically asked for those vouchers and the checks on Winckler and they had all been pulled. [2814]

The Court: Pulled or polled?

(Testimony of John A. Lynch.)

The Witness: Pulled. Somebody had pulled them. We had questioned Mr. Smith relative to them and he didn't know where they were.

So all this that you are asking me, we had specifically asked for those vouchers and we never got them, so we had no knowledge of what was on those vouchers. [2815]

Q. (By Mr. Dixon): So all you did, then, was to take the amount set up in the books that you saw was charged to Winckler, without following through further?

A. That's right. And I so testified Friday on that, that we weren't passing on whether they were meritorious charges, or not.

Q. These items in '49 were charged shortly after the company resumed operations, were they not?

A. That is correct.

Q. And the cash with which these expenditures were met had to be supplied by somebody, didn't they, Mr. Lynch?

A. It came from the proceeds of the sale of the assets.

Q. That is the only source?

A. That is the original source.

Q. That is your opinion?

A. No, it is not my opinion: that is a fact. Then they secured additional working capital by loans from Rubin and Parvin to the extent of $22,500, provided Winckler put in his $2500 which they gave him for his stock.

Q. This is my question, Mr. Lynch: In other

(Testimony of John A. Lynch.)

words, the stockholders of this company, after it resumed operations in '49, did loan and furnish money to the company with which current expenditures were paid and met, did they not?

A. There is no question about that.

Q. And your audit so showed at the time you made it? [2816] A. That is correct.

Q. You are now satisfied, are you, that the items that you mentioned were for reimbursement to Mr. Winckler were amounts that he advanced the corporation to pay the bills in question?

A. On those listed I never questioned it, because we had no information to doubt it.

Q. I thought you did. If I didn't, I wasted a lot of time here, Mr. Lynch.

A. You surely have.

Mr. Dixon: Will you distribute to the jury, please, those sets.

The Clerk: Exhibits BD, BE, BF, 61, 63, and 65.

Q. (By Mr. Dixon): While the bailiff is distributing those, Mr. Lynch, I would like to ask you when you requested Mr. Smith specifically to secure for you or to make available to you the vouchers that you have said you requested and didn't get.

A. Mr. Regan, my employee, through me, asked for them and was advised——

Q. You didn't ask yourself?

A. I personally didn't, but my office did, and I am responsible for the presentation here.

(Testimony of John A. Lynch.)

Q. Do you know of your own knowledge that the request was made of Mr. Smith and [2817] refused?

A. Mr. Regan so informed me. I have no reason to doubt that.

Q. Maybe I didn't get your testimony here a few minutes ago, but I thought you said you had requested.

A. I said "we." My office. Our office requested it, not I specifically.

Q. You, yourself, had never requested them of Mr. Smith, then, and been refused?

A. No, sir.

Q. Directing your attention, Mr. Lynch, to Exhibit BD, this exhibit purports to represent your view, does it, of the income of Winckler & Smith during the fiscal years ending January 31, 1950, '51 and '52? A. That is correct.

Q. By income do you ever distinguish between income received during the course of operations of a company in the normal course of business, and income that may be derived from casual transactions or extraordinary transactions?

A. Oh, yes, sir.

Q. Do you regard both as being within the income category, according to your statement?

A. No. If I could define it. There is an operating income which represents all revenue minus the costs of obtaining that revenue, to arrive at an operating income. From that is deducted all the miscellaneous income and miscellaneous [2818] expense

(Testimony of John A. Lynch.)

and casual sales or extraordinary sales, gains and losses, to arrive at net income. That classification I will agree is right.

Q. Do you ever distinguish in your accounting between operating income, which represents the income and profit arising out of the ordinary course of business operations, and income which may be chargeable as an accounting matter during the year, such as from the sale of assets, profits from the sale of assets? A. Oh, yes.

Q. You regard that as operating income?

A. Operating income is the income from operations.

Q. Will you tell the jury, Mr. Lynch, whether this statement BD, headed Statements of Income, covers what you regard as income from all sources, or does it limit itself to what accountants call or sometimes people refer to as operating income?

A. No, I would say it is net income for the entire year from all sources.

Maybe I could refer to it as an all-inclusive term, net income for that year, which in this case was a net loss.

Q. Will you refer to Plaintiffs' Exhibit 61, the income account for that year ending January 31, 1950.

Mr. Fisher: I don't think the witness has 61 in front of him. [2819]

The Court: The jury has. I will lend the witness my copy.

Q. (By Mr. Dixon): You have under Admin-

(Testimony of John A. Lynch.)

istrative Expenses for that year $94,722.63, and Plaintiffs' Exhbit 61 has under Administrative Expense $56,417.38, I believe. A. Yes, sir.

Q. As I understand it, this additional amount, or the difference there being some $38,000 or more, is represented by this item that has been frequently referred to in this case as the forgiveness item?

A. That is correct.

Q. Arising out of the time of the reorganization, during that period?

A. Not out of the reorganization; I will differ with you on that.

Q. That is your opinion, at least?

A. That is correct.

Q. It doesn't at all arise out of the reorganization? A. No connection with it.

Q. So you want the jury to regard that $38,000, plus, as part of the transactions of the operations of this company after it came out of the reorganization; is that correct?

A. 10,000 of the money was paid during this period for that $38,000, and it is a proper charge against income for this year.

Q. Well, I think there is evidence here that based on [2820] minutes back in January, and so forth; but at least it is your view, and you want this jury in considering Exhibit BD, to consider that item $38,140, plus, whatever it is, the forgiveness item, as part of the administrative expense of this corporation for the year after they resumed opera-

(Testimony of John A. Lynch.)

tions following the termination of proceedings under Chapter XI, is that correct?

A. As either additional compensation or as a bad debt, that is correct.

Q. Going to the next column, you have miscellaneous expense, and so forth——

The Court: It is not a column; it is an item.

Q. (By Mr. Dixon, continuing): ——depreciation on appreciation and loss on sale of assets, in the amount of $170,579.56. That item is not contained in Plaintiffs' Exhibit 61, is it, Mr. Lynch?

A. No, sir; it is not.

Q. And this $170,000 that you have put in the income account for Winckler & Smith during the fiscal year ending January 31, 1950, represents the loss, does it, to this corporation on the reorganization and sale of the assets?

A. That is correct, the loss on the sale of the fixed assets in April.

Q. You think that didn't come out of the reorganization and should be charged against this corporation as part of [2821] its operating loss?

A. I know it didn't come out of the reorganization.

Q. You say it didn't come out of the reorganization?

A. No, sir. It was an actual sale of the land, buildings and plant on April 3rd and had nothing to do with the reorganization.

Q. You mean, then, that the sale of the plant under the reorganization proceedings in Chapter

(Testimony of John A. Lynch.)

XI had nothing whatever to do with the reorganization proceedings?

A. There is nothing in the reorganization proceedings relative to how the funds are raised for the creditors. Nothing compelling them to sell the land, buildings and equipment.

Q. That is your view, anyhow?

A. That is my understanding of the record that I have referred to and read.

Q. So, including that you come up with a net loss for the fiscal year ending January 31, 1950, of some $91,220.20, as against a profit shown on the income account statement of the plaintiff, Exhibit 61, of $121,360.21; is that correct?

A. That is correct.

Q. So that by including the $38,000 items that you referred to as administrative expense, and including this so-called loss on sale of assets of over $170,000, as part of the income chargeable to this corporation or against it during the year, you come up with this difference of about [2822] $212,000, or more, over the statement indicated in Plaintiffs' 61, is that correct? A. That is correct.

Q. Now, if this loss is chargeable, that is, $170,000 loss is chargeable to income, Mr. Lynch, what about the amount which the corporation, say, under this theory might have realized from the savings of not having to pay the creditors in full under the reorganization; do you anywhere in BD show any income to that amount in that statement?

A. The $205,000 forgiveness of creditors?

(Testimony of John A. Lynch.)

Q. Yes.

A. No. That was not voluntarily forgiven. That was a paid in capital, because they were compelled to do it. This was voluntary and happened subsequent to the reorganization and was an ordinary transaction. I shouldn't say "ordinary"; it could have been extraordinary, to sell all your assets, but it was a transaction within the managerial scope of the corporation.

One dollar loss, whether you are selling orange juice or whether a one dollar loss selling a fixed asset is still a dollar out of that corporation and a loss for the year.

Q. But somewhere in this transaction I thought you said that the corporation had some kind of a gain here of this $205,000?

A. $205,000 forgiveness. There was no cash passed [2823] into the corporation.

Q. I understand there was no cash. I am asking you about the item, Mr. Lynch.

A. That is correct, there was 205,000 gain on the reorganization by the payment of 25 cents on the dollar to the creditors.

Q. But you don't put the gain, then, of $205,000, this bookkeeping gain, as income during the year ending January 31, 1950, do you?

A. No, sir. It is not——

Q. But you do charge the corporation, in your accounting procedure here in BD, with the loss from the sale of the assets?

(Testimony of John A. Lynch.)

A. There is no relationship. The first was the reorganization effect, and the second is an actual loss of assets sold by the company. They could have borrowed the money and they wouldn't have had to dispose of their assets.

They probably would have been better off.

Q. Do you think this sale of assets was made after the Chapter XI proceeding was terminated and the trustee in that proceeding discharged, and so forth?

A. Definitely. The escrows weren't terminated until March 4th.

Q. So that sale, then, of the assets was wholly independent of the trustee control of the property under [2824] Chapter XI, and was an independent transaction entered into by this corporation after it came out of the Chapter XI proceedings; is that your view?

A. That is correct. And it is in accordance with Mr. Hodge's own statements. March 1st was the sale.

Q. We will talk about Mr. Hodge a little later.

Based upon that view you have excluded as income the $205.000 from this statement, but have set in the loss of $170,000?

A. The loss was a corporate matter. The loss was within the power of the corporate officials. The gain——

The Court: Wait just a minute. You are just like Mr. Hodge. I had the same trouble with him. First answer the question, then give your explanation.

(Testimony of John A. Lynch.)

All you accountants, and lawyers when they are called as witnesses, do the same thing.

Read the question back.

Then answer the question, and then give any explanation you want to give.

(The question was read by the reporter.)

The Witness: That is correct. [2825]

Q. (By Mr. Dixon): All right. You have answered my question. Now——

The Court: All right. Now, wait a minute. He said that is what he had done.

The Witness: The 205,000 was a capital transaction. It was an involuntary act on the part of the creditors. They certainly didn't want to put the money in the corporation. So it is not income to the corporation. It was a capital transaction. The 170,000 loss could have been avoided. It was a managerial problem. They sought to take the loss and they were charged with it. The loss is a loss to the corporation.

The Court: Now, it's time for recess. We have been over this and the questions have been asked. Can we wind this up and take the recess before we go to the next one?

Mr. Dixon: Yes, your Honor.

The Court: All right.

Q. (By Mr. Dixon): But if you wanted to include this $205,000 item in the account for this year, even under your own method here, there would

(Testimony of John A. Lynch.)

have been a profit of over $104,000 for this year, that is a fact, isn't it, Mr. Lynch?

A. If I had assumed 205,000 additional income?

Q. Yes.

A. That would show $115,000 profit. [2826]

* * *

Q. Mr. Lynch, again directing your attention to BD, and will you kindly refer to Plaintiff's Exhibit 63, the income account statement for the fiscal year ending January 31, 1951, and directing your attention specifically to selling expense in the amount of $154,630.83 on BD as against $128,294.91 on Plaintiff's Exhibit 63——

The Court: Where is the selling expense on BD?

The Witness: Right here (indicating).

The Court: All right. I find it.

Q. (By Mr. Dixon): ——there is a difference there of some $26,000, is that correct?

A. That is correct.

Q. If I understood your testimony on direct, you have included in that $154,000 the $24,000 plus that Mr. Hodge [2827] testified he allocated to this year in addition to a like amount for the following year to selling expenses because of the approximately $48,000 that was spent by the plaintiff in promoting these other products, is that correct?

A. That is correct.

Q. How do you account for the difference? What is the small difference there?

A. As I explained earlier, we had made an ad-

(Testimony of John A. Lynch.)

justment throughout each year for depreciation on assets. I believe Mr. Hodge depreciated during the rental period over a ten-year period, and we depreciated the property under the leasehold where the lease was to expire, we depreciated the property over the life of the lease, which is proper accounting for items of leasehold improvements. That is a technical adjustment.

Q. That is a technical adjustment, you say?

A. That is correct.

Q. On depreciation? A. That is correct.

Q. But the substantial part of the difference——

A. The $25,000.

Q. In other words, you took all of the 48,000 and put it in 1951 insteead of breaking it down in half and carrying half of it to 1952, as Mr. Hodge did.

A. We showed it as the books reflected it until the [2828] year-end adjustment.

The Court: Now, now, wait. Again first answer the question and then explain. You put it all in the year 1951 instead of putting it in two years.

The Witness: That is correct.

The Court: Go ahead.

The Witness: That is as the books reflect until such time as Mr. Hodge made the January 31, 1951, adjustment.

And the further reason why we did it was that the total expenditures for advertising, for instance, subsequent to the July 31 statement of Mr. Hodge and of the corporation, reflected that only $13,270

(Testimony of John A. Lynch.)

had been spent for advertising, and the entry setting that deferred promotion up set up approximately $13,300, a little bit more than they had actually expended, but the expenditures from July 31 on represented items of all types, store demonstrations, Railway Express, California Truck Rental Company, and so forth. We found no foundation for deferring any promotion expenses, and the analysis of sales showed a definite decline in the sale of ades and lemonades and citrus products. That figure, as I testified to earlier, was in excess of the actual sales for the entire year for all the products for which the expense was deferred.

Q. (By Mr. Dixon): So that based on that you put it all in one year rather than two years? [2829]

A. Where we felt it properly belonged.

Q. You didn't regard that as promotional expense that could be deferred over the two-year period.

A. Mr. Hodge didn't defer it two years, either. He charged it off in six months.

Q. It happens to come within the half of the year, doesn't it? I mean half of it comes within one fiscal year and half in the other in Mr. Hodge's statement.

A. No. The amount he deferred he expensed immediately in the following six months.

Q. You mean now Mr. Hodge put all this $48,000 in the operating account or expense account?

A. No.

(Testimony of John A. Lynch.)

Q. Represented in Plaintiff's Exhibit 63.

A. No. You misunderstand me.

Q. That is my question, Mr. Lynch.

A. I was making the statement that the $24,910 which was deferred at January 31, which according to my notes accompanying the statement, were to be deferred over a two-year period, were not. They were expensed immediately within the six months subsequent to that statement.

The Court: Within six months of the succeeding year.

The Witness: That is correct.

The Court: They were placed in two years, but according to the Hodge method, he showed half of them expended in the [2830] first six months of the succeeding year.

The Witness: That is correct.

The Court: All right.

Q. (By Mr. Dixon): Now, directing your attention to the administrative expense item of $96,392.62, Plaintiff's Exhibit 63 shows $90,858, a difference of about $5,534.62. What items have you added to administrative expense, Mr. Lynch?

A. As I recall——

Q. To make up this difference?

A. That is the year in which the checks were issued to Mr. Winckler as a bonus and charged to administrative expense, and then were reversed in the amount of $3,550, thereabouts, were reversed, and set up as prepaid bonus, and then turned around and expensed in the following year. That is

(Testimony of John A. Lynch.)

our difference. We have transferred it into the year in which the checks were taken and as they were originally charged on the books prior to [2831] reversal.

Q. In other words, you took something out of administrative expense in 65 that you thought was improperly charged to administrative expense in 65, and put it back in administrative expense in 63, on plaintiffs' statement, is that correct, to arrive at your figure of $96,392.62?

A. That is correct.

Q. What item in 65 under administrative expense did you take out and charge to the fiscal year January 31, 1951, in your BD to get the $96,392.62 figure?

A. We reversed the $3550 bonus, which was represented by the two checks given to Mr. Winckler in 1950 and charged to operations, that was reversed by the auditor at the year end, we let it stand as reflected on the books.

Q. Just a moment. My question is, is this 5534.62, which you have included in this 96,392.62 contained anywhere in any of the items in Plaintiffs' 64, administrative expense?

The Court: 65, do you mean?

Mr. Dixon: 65, yes, your Honor.

The Witness: Yes, it would be. It is the deferred items which were set up as deferred items. We expensed them. The administrative expense of $1968.40 and the $3550 bonus will account for that difference.

(Testimony of John A. Lynch.)

Q. (By Mr. Dixon): What I am trying to get you to answer, if you can, Mr. Lynch, is where do you find this $5500 item in Plaintiffs' 65 under administrative expense? [2832]

A. The $3500 is included in executive salaries under the $18,008.88 taken by Mr. Winckler in salaries for the year end. We only show $14,000 on our statement. But the $3500 is included in that $18,000 there. We put that back in the proper year.

Q. If my figures are correct, I am talking about $5500, not $3500.

A. I will agree with that. We made two adjustments. One is the traveling expense included in the deferred—in the unabsorbed preseason expense of $22,968.42 on the 63 balance sheet. That is made up of, referring to Exhibit 63, unabsorbed preseasonal expenses, the $22,443.84 is made up of $19,268.42 of factory expense, and 3175——

Q. Now, Mr. Lynch, you completely lost me. I asked a question where do you find this $5500 that you have put in administrative expense here, in your BD for the fiscal year January 31, '51, in Plaintiffs' 65 administrative expense, and if I understand part of your answer I thought you said that you had taken $3500 out of the $18,008.88, it would have to be, of executive salaries in Plaintiffs' 65? A. That is correct.

Q. Well, that accounts for $3500. Now, where is the other 2,000? A. Traveling expense.

Q. Do you mean—— [2833]

A. $1,986.40.

(Testimony of John A. Lynch.)

Q. In other words, you took it out of the travel item in Plaintiffs' 65? A. That is correct.

Q. And charged it to the January 31, '51 statement, is that correct?

A. If I could clarify it a little further——

Q. Answer my question if that is what you did.

A. That is correct.

Q. All right.

Mr. Strachan: I think the witness should be allowed to clarify as he goes along, your Honor.

Mr. Dixon: Yes, counsel. You can clarify it, too, but I think I am conducting the examination.

The Court: If it hasn't been clarified. The trouble with this cross is we get the same question and we get the same clarification over and over again.

Is there something more you want to add now?

The Witness: I want to show that they are on Exhibit 63 reflected in—the $3500 is reflected in the deferred promotion expense, and the $1900 is reflected in unabsorbed preseason expense, which then became expense in the 65 exhibit. We put it in the proper year here.

Q. (By Mr. Dixon): You are talking about the balance sheet on 63. I have been talking about the income account [2834] showing the administrative costs, Mr. Lynch.

When you refer to another item, if you do, in your testimony, Mr. Lynch, will you please tell me when you are referring to the balance sheet and

(Testimony of John A. Lynch.)

when you are referring to the income statement for these particular exhibits? A. Yes, sir.

Q. I notice that you have set up separate accounts for the Florida business in your January 31, '51 statement. You don't have any amount for allowances there, but you do have in your January 31, '52, item the amount of $4,720.92. Is there any particular reason for that?

A. That is as they are reflected on the books. In 1951 or 1950 year, all——

Q. The 1950 year, or what? I am talking about the fiscal year ending January 31, 1951.

A. Right, that is the one I am referring to.

Q. All right. Proceed.

A. In that year there were no separate accounts maintained on the books of the corporation to reflect these items where we have a zero. In 1952, the year ended January 31, 1952, the books and records reflect that segregation in accounts. If I recall we haven't adjusted those at all.

Q. You didn't adjust that?

A. To my knowledge, without checking. But I don't believe we touched those accounts. [2835]

Q. Well, I notice that you have broken the costs of the sales, however, and you have got for Florida $220,085.98, to which item we must add the above amount $1,267,786.80, is that correct, if we want to get the total cost of sales for all operations?

A. That would be correct.

Q. And if you add those figures together you get $1,487,853.98 as being the cost of sales as against

(Testimony of John A. Lynch.)

the cost of sales in the income account statement, Plaintiffs' Exhibit 63, of $1,464,694.59. Now, there is a difference there of $23,159.39, isn't there, cost of sales? A. That is correct.

Q. How do you account for that?

A. Well, that represents the $19,268.42 of unabsorbed factory expense which was capitalized on the company's statements——

Q. Where do you find that in the exhibits?

A. On Exhibit 63 balance sheet, in the $22,443.84. Nineteen thousand——

Q. Just a moment.

A. Unabsorbed preseasonal expenses, it is in there.

Q. You brought that down, in other words, the unabsorbed preseasonal expense in Plaintiff's 63 balance sheet for the year ending January 31, '51, you have taken that item out and included it in the cost of sales? [2836]

A. Definitely. That is where it properly belongs.

Q. That isn't all sales, is it?

A. No. $19,268.42, I believe, is the amount which we included in plant expense as being the expense of operations of that plant for that year.

Q. Well, then, you have the following differences between Plaintiffs' 63 and your statement of income in BD, if I summarize it correctly: You have a difference in selling expense of $26,335.92, a difference in administrative expense of $5,534.62, and another item of $23,159.39, which you have

(Testimony of John A. Lynch.)

charged to cost of sales, or a total difference of $54,048.93, is that correct?

A. That is correct. [2837]

Q. In other words, you have added those additional items to your BD in arriving at the loss of $14,203.20 which, according to your view, the corporation sustained in its income operations or its operations during the year ending January 31, 1951, is that correct? A. That is correct.

Q. All right. Now——

The Court: Do you have something further you want to say?

The Witness: I want to say these are the same items which we expensed from that balance sheet we have been referring to. The 50,000 is made up of 24,910 deferred promotion expense and 22,443 of unabsorbed factory expense. It is the same amount. We put them in as expense rather than on this balance sheet.

Q. (By Mr. Dixon): Directing your attention again to BD and your views of operations for the year January 31, 1952, there is a difference there in operations between Plaintiff's Exhibit 65, income account, and yours, in the amount of 27,097 and some five cents, is that correct?

A. That is correct.

Q. That reduces the loss which you think the plaintiff suffered in 1951 from the $184,523.20 set forth in the income account statement of the plaintiff, 65, for the fiscal year ending January 31, 1952, to $147,135.33, is that [2838] correct?

(Testimony of John A. Lynch.)

A. That is correct.

Q. That difference is made up primarily of the fact that in your summary for January 31, 1952, you do not include $24,000 which was half of the $48,000 item that Mr. Hodge put over in his January 31, 1952, income statement.

A. That is part of it, that is correct.

Q. Now, directing your attention to BE, I believe you stated that this merely reflects your views of the operations of the plaintiff as shown by their balance sheets, and so forth, with the adjustments on depreciation and operating expenses and so forth, that you have previously dealt with in your BD, is that correct?

A. That is correct.

Q. In other words, if we were to take the time to compare your BE items with the plaintiff's Exhibits 61, 63, and 65, we would find the same differences reflected here that we have heretofore discussed, is that correct?

A. That is correct, restricted to the deferred charges and the surplus, I believe.

Q. Directing your attention to BF, this purports to reflect your views as to the retained earnings or surplus of the plaintiff, does it, for the period February 1, 1949, to January 31, 1952?

A. That is correct. [2839]

Q. I notice you have put in here the item 205,098.52 as income, or at least it goes into the pot somewhere for the corporation, is that correct?

A. This is as per the books classified by us. It

(Testimony of John A. Lynch.)

has been recorded as a credit to surplus, capital surplus, and I thing properly so.

Q. But you didn't include it in your statement of income for the fiscal year January 31, 1950, in your BD exhibit, did you?

A. No, because it was not income.

Q. Here we do find you regarded it somehow as a rather substantial asset.

A. That's right, but this is not an income statement. This is a surplus analysis.

Q. And this again, Exhibit BF, reflects, doesn't it, in substance your views that you have previously expressed and which are set forth concerning the books of this company and its operations in plaintiff's Exhibit BD? A. That is correct.

The Court: In that connection, you have carried over from BD your figures of loss for the respective years, such as the 91,000 in the year ending January 1950?

The Witness: That is correct.

The Court: The 14,000 in BD in the year ending 1951.

The Witness: That is correct, your Honor. In fact, [2840] there are three statements relating to that.

Q. (By Mr. Dixon): Now, Mr. Lynch, during the course of the rather extensive audit that you conducted of the books of this company, you also went into the application of this corporation which was filed with the Corporation Commission of the State of California in 1951 for authority to issue

(Testimony of John A. Lynch.)

stock for the purpose of securing additional capital, is that correct? A. That is correct.

Q. Now, in connection with this exhibit, plaintiff's Exhibit 39, do you accept the statement of fact contained therein that there was a loss of $519,155.55 based on inventory, at least accept the figure of the loss, that's all? A. Definitely not.

Q. You don't accept that? A. No, sir.

Q. You think the Corporation Commissioner of California erred in accepting that figure, do you, in this prospectus?

A. I am not at liberty to pass on that.

Q. At least you don't accept it.

A. As far as I am concerned, he erred.

Q. In other words, you don't accept the statement, then, that this corporation had this loss that Mr. Winckler has testified to and which has been referred to during the course of testimony of witnesses in this case in this amount, is that [2841] correct?

A. That is correct. hTe books fail to reflect any such loss.

Q. The books?

A. The books do not reflect any inventory losses except those I quoted the other day.

Q. Then you think that this statement is incorrect? A. I definitely do.

Q. The Corporation Commissioner in checking the application should have disregarded it?

Mr. Strachan: There is no indication that the Corporation Commissioner ever checked it, your

(Testimony of John A. Lynch.)

Honor. These are representations that were made to an officer.

The Court: We are not trying what happened before the Corporation Commissioner. That is another issue we are not trying. We don't care whether he is right or wrong. That is not an issue in this case.

Q. (By Mr. Dixon): Did you accept the statement contained in this Plaintiff's Exhibit 39 in making the various computations, Mr. Lynch, that disregarded this non-recurring inventory loss in the amount of $519,155.55, which was absorbed by the corporation over a period of three years, that the corporation would have had total earnings during the period, and including those of the partnership, of $559,690.88? A. I did not. [2842]

Q. So I take it you did not accept as a fact any of the statements contained in Plaintiff's Exhibit 39 here with reference to the loss or with reference to the total earnings of the corporation and the partnership during the period referred to in Plaintiff's Exhibit 39, exclusive of that loss?

A. I did not accept that as a fact. The exhibits we had differed materially from these.

Q. You did check thoroughly through the files of the Corporation Commission, did you not?

A. I did.

Q. In connection with this application?

A. I did.

Q. And did you examine the stock book of this

(Testimony of John A. Lynch.)

corporation to see how much stock was offered and sold under this prospectus? A. I did.

Q. And can you tell the jury how much approximately and how many stockholders purchased stock pursuant to this authority?

A. I can tell you exactly, yes, sir.

Mr. Strachan: Are these some of your working papers, Mr. Lynch?

The Witness: Yes, sir. There were 7,578 shares sold to the public, and 26,535 shares issued to Rubin, Friedman [2843] and Rubin for the purchase of the plant. Preferred stock. The common stock was just exchanged, so many shares for so many shares held. They weren't sold. [2844]

Q. (By Mr. Dixon): Now, referring to Plaintiffs' 61 and 63, balance sheets on those exhibits, I direct your attention to the valuation or the amount placed on the balance sheet with reference to the lease and option to repurchase at $1.00. I take it that is one item in these documents that you would agree was properly on the balance sheet and properly valued?

A. I don't know. It was referred to as patents once.

Q. I beg your pardon?

A. It was referred to on one statement as a patent and formula.

Q. I am not referring to any patent or formula. I asked you about the valuation placed on the balance sheet of this company in Plaintiffs' 61 and 63 of the lease and option to purchase at $1.00.

(Testimony of John A. Lynch.)

A. That is a nominal value.

The Court: Again, the question is, do you agree or disagree with that figure of $1.00?

The Witness: I agree with $1.00.

Q. (By Mr. Dixon): You don't think that is overvalued? A. No.

Q. In connection with the reacquisition of assets when that option was exercised, there was some money paid out, was there not, by the corporation, and some preferred stock of the corporation issued for the plant property covered [2845] by the option referred to in the balance sheet just mentioned, is that correct?

A. $21,000 worth of preferred stock was sold and netted the corporation——

Q. Mr. Lynch, if you would please answer my question, if you will. Can you answer the question?

The Court: Read it.

The Witness: $17,325 cash——

The Court: Just a minute, now.

Read the question.

Some of these questions, Mr. Lynch, you can answer yes or no, and if an explanation is required you will be permitted to make it. But this is a simple question and it is apparently a preliminary question to something else.

Read it, Mr. Reporter.

(The question referred to was read by the reporter, as follows: "In connection with the reacquisition of assets when that option was exercised, there was some money paid out, was

(Testimony of John A. Lynch.)

there not, by the corporation, and some preferred stock of the corporation issued for the plant property covered by the option referred to in the balance sheet just mentioned, is that correct?")

The Witness: Yes.

Q. (By Mr. Dixon): And the amount paid out in cash was [2846] how much? A. $17,325.

Q. And the prefered stock?

A. 26,535 shares.

Q. Now, in your examination of the books of this company can you tell this jury how much this corporation spent from the time it resumed operations after the Chapter XI proceedings through the period ending January 31, '52, on new equipment used at the plant of the plaintiff corporation?

A. I believe I could.

Q. About how much was it?

A. $97,834.71, I believe.

Q. That was equipment that was added to the plant which was not covered or included in the appraisal in 1946, is that correct?

A. That is correct.

Q. Now, in setting up the books here, I mean your view of the books, when the company exercised its option did it realize a profit which should have gone into the income account according to your view? You took the loss, you remember. Now, did you put the profit on this transaction in the income account of the corporation during the year in which

(Testimony of John A. Lynch.)

it was exercised and realized according to your view? A. A profit on a purchase?

Q. Yes, in the income account? [2847]

A. They had a $100,000 loss. They had to pay $100,000 more to get it back.

Q. Please answer my question.

A. I can't visualize a profit on an ordinary purchase.

Q. That is not my question, Mr. Lynch.

Do you understand my question?

A. No, I do not.

Mr. Dixon: Will you read it, please?

(The question referred to was read by the reporter as follows: "Now, in setting up the books here, I mean your view of the books, when the company exercised its option did it realize a profit which should have gone into the income account according to your view? You took the loss, you remember. Now, did you put the profit on this transaction in the income account of the corporation during the year in which it was exercised and realized according to your view?")

The Witness: There was no profit on that transaction to be placed in the income account.

Q. (By Mr. Dixon): You mean you don't think there was any difference between the one dollar at which this was valued on the books and the write-up, or whatever valuation it might have been carried at on the books, you don't think that was

(Testimony of John A. Lynch.)

income, from your accounting point of view, is that [2848] correct?

A. As I look at it, it would be a $99,999 loss. They had to pay $100,000 more to get it back. I would see no profit in that transaction.

Q. So that from your point of view, you took the loss in '49 and charged it to income?

A. That is correct.

Q. But you thought there wasn't any profit that should be charged to income when they bought it back in 1951?

A. There certainly would not be a profit to buy it back.

Q. In your opinion? A. That is correct.

Mr. Dixon: That is all. Thank you.

The Court: Let me ask this question: When you took the loss on the sale of the assets, in computing that loss did you figure that $1.00 in there?

The Witness: No, your Honor.

The Court: After the property was sold there was $1.00 carried on the books, which I suppose is a way of putting a nominal value upon some right, just in order to keep it on the books?

The Witness: They just recorded $1.00 entry.

The Court: Did you calculate the difference between that $1.00 and what the property was worth before?

The Witness: No, your Honor. [2849]

The Court: You ignored the dollar?

The Witness: That is correct.

The Court: But you took the loss on what the

(Testimony of John A. Lynch.)

property had been set up before and now the corporation didn't have it, so you showed a loss?

The Witness: That is correct. The dollar was set up subsequently as a value, a separate transaction, a separate entry.

The Court: Set up later?

The Witness: It may have been simultaneously, but it was a later entry in the books. It may have been the same day.

* * *

The Court: The record shows the jury absent.

Have you made any determination as to RS and RT?

Mr. Strachan: BS.

The Court: BS and BT.

Mr. Strachan: We went over it at length, and the accountants say they can support every item in that. [2850]

The Court: You haven't resolved the conflict as to whether oil should be in or out?

Mr. Strachan: We feel the oil should be in there and it should have been in Hodge's exhibit.

The Court: I have been over it again, and my thinking is very clear on it, and I will tell you again the logic of it.

In Exhibits 66 and 67 the plaintiff was offering an exhibit to show what Silzle and TreeSweet were paying for—they were drawing a comparison between the $40 they claim they were charged for oranges, if they bought them, and what TreeSweet and Silzle were charged for oranges, and therefore

(Testimony of John A. Lynch.)

to make that comparison you had to see what Sunkist got, because Sunkist was getting $40 from plaintiff, and plaintiff says Sunkist was getting less money on the oranges they gave to Silzle and Tree-Sweet. Therefore oil became important, because the comparison was on the basis of what was Sunkist selling for or what was Sunkist getting for the oranges that went to TreeSweet and Silzle. Oil is, therefore, involved.

In the comparison made by the plaintiff on the mythical 12,000 tons, there is a different comparison. The problem involved was what would the plaintiff have made had it had 12,000 additional tons. Therefore, there should have been taken into account, in what the plaintiff made, what it made on oil, and what it cost them to make the oil. Oil should [2851] have been considered. But what Sunkist would have got for the oil has nothing to do with that comparison. I am certain of that.

You are certainly entitled to show elsewhere the difference in the oil return to Sunkist, but there is no problem involved on this comparison of Plaintiff's 69 and whatever you offer in rebuttal, as to what Sunkist would have gotten.

It is what the plaintiff would have made.

I think there is your fallacy.

Mr. Strachan: In our exhibits we intend to do more than strictly rebut on the assumptions and only the assumptions that Hodge made in his computation on 69. [2852]

(Testimony of John A. Lynch.)

The Court: Well, then, your exhibit you use in rebuttal to 69.

Mr. Strachan: This is more than in rebuttal. This is a part of our affirmative showing as to what the gain or loss would have been had Winckler & Smith paid what Sunkist got from TreeSweet in order to get this fruit. So I think that what we are proposing to show in this Exhibit BS is what your Honor says we are entitled to show affirmatively.

The Court: Now, I am not going to limit you in certain of these things you want to prove. I do have some discretion on how you prove them. I am not going to have the record confused with an exhibit purportedly for one purpose used for another purpose.

Mr. Strachan: I am frank with you. I am not doing it for the purpose of rebuttal only. I am doing it as part of our affirmative showing as to what the gain or loss should have been.

The Court: Whether I will let that exhibit be used or not will be a question answered on what you show to me later. If you leave the oil in there, you can't argue to this jury it is in rebuttal to Plaintiff's Exhibit 69.

Mr. Strachan: It is our own independent computation.

The Court: It is not a comparable computation. It is taken from an entirely different standpoint. It is an unfair way to make a comparison. [2853]

Mr. Strachan: As to whether it is fair or un-

(Testimony of John A. Lynch.)

fair, I think Mr. Hodge was unfair in that he ignored the fact that TreeSweet paid this and if Winckler & Smith had a comparable deal Winckler & Smith could have made this at $25 a ton. He has assumed $16 or $17 a ton, which we don't think is a proper comparison and we intend to criticize the comparison on that basis as a part of our affirmative defense.

The Court: Well, you have got my views on what type of exhibits you are going to use and what we will do with the exhibits. I want you to bear in mind in connection with any showing you may make——

Mr. Strachan: It is my thought if Mr. Hodge was entitled to make his assumptions and put in an exhibit based on his assumptions, we should be allowed to apply our theory, too.

The Court: What do you think I read the record to you for the other day? I pointed out that Exhibit 69 came in following two days' cross-examination, and in a way it was at the court's request that the thing be reduced to writing so we would have something to look at, and at the same time I said you could make a comparable exhibit based upon your cross-examination in the matter. If it hadn't been for that, the exhibit wouldn't be in at all. So both exhibits, if you make one, will be limited to what this record shows up to date on that. [2854]

Mr. Strachan: At the time the exhibit will be offered, we will have some of our affirmative evi-

(Testimony of John A. Lynch.)

dence on the matter before the court and jury, I expect.

The Court: And at that time I will see what will be done. Don't be misled.

Mr. Strachan: I don't think I am, your Honor.

The Court: 2:00 o'clock.

(An adjournment was thereupon taken to 2:00 o'clock p.m.) [2855]

Tuesday, January 24, 1956—2:00 P.M.

The Court: The record will show the jury present.

Proceed.

JOHN A. LYNCH

called as a witness on behalf of the defendants, having been previously sworn, resumed the stand and testified further as follows:

Redirect Examination

By Mr. Strachan:

Q. Mr. Lynch, I wish you would describe for the jury what books and records you did, and what you did not have access to during your investigation, rather, the investigation conducted by your firm?

Mr. Dixon: If the court please, I object to that broad question, unless it is directed to some particular book that this witness has testified was denied him.

(Testimony of John A. Lynch.)

The Court: Is this going to take very long?

Mr. Strachan: No.

The Court: All right. Let's go on. Overruled.

The Witness: Our firm had access to the corporate books of account of Winckler & Smith Citrus Products Company for the year ended January 31, 1950; January 31, 1951, and January 31, 1952. It embraced the general ledger and the journals. We had the journal entries and monthly trial [2856] balances and bank reconciliations, and accountant's work papers.

The Court: And you had access to the financial balance sheets from the Corporation Commissioner's file for prior years?

The Witness: I was going to go into that.

We had available the file of the Commissioner of Corporations for the State of California, which included the statements and extractions of the minutes up to approximately April, 1951. That included the financial statements for the preorganization period and January 31, 1950, and January 31, 1951. We also had available transcripts of testimony, which were before the court in various hearings that were held prior to and subsequent to the reorganization.

Sometime in October or thereabouts, vouchers and checks were made available to Mr. Regan out here in California for the period subsequent to the reorganization, and after the trial started there were made available the books and records of the company, together with vouchers for the period

(Testimony of John A. Lynch.)

year ended January 31, 1947, and the year ended January 31, 1948.

We never had access to the year ended January 31, 1949.

Q. (By Mr. Strachan): As I understand it, you never had access to the vouchers or copies of checks payable to Winckler and had never seen any of those until this morning when you were shown two or three; is that correct? [2857]

A. That is correct.

Q. Now, in your analysis of the facts represented in the prospectus filed with the Commissioner of Corporations, is there anything in that analysis which in any way conflicts with anything done by the Commissioner of Corporations?

A. No, there is not.

The representations in the prospectus were never in any—what is recorded in the prospectus are merely representations made by the client, by the plaintiff, and as the permit itself states on the back, "This permit does not constitute a recommendation or endorsement"——

Mr. Dixon: If the court please—well, all right.

The Court: Go ahead.

The Witness (Continuing): ——"of the securities permitted to be issued, but is permissive only."

These were just representations of the plaintiff and in no way—that is it, period. [2858]

Q. I think that you said that in the order of the court in connection with the approval of the third plan of reorganization under the Chapter XI

(Testimony of John A. Lynch.)

proceedings, the order directed that the assets revest in the corporation free and clear of all liens. I believe it was subject to the RFC's first mortgage lien.

A. That is correct. The assets were always subject to the RFC mortgage and during the period of the lease the corporation was subject to the RFC mortgage.

* * *

FRANCIS A. REGAN

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Francis A. Regan.

Direct Examination

By Mr. Strachan:

Q. Where do you live, Mr. Regan? [2859]

A. Chicago, Illinois.

Q. What is your business or occupation?

A. I am a certified public accountant employed by the firm of John A. Lynch & Company, Chicago, Illinois.

Q. How long have you been licensed to practice as a certified public accountant?

A. I have been licensed in the State of Illinois since 1946.

(Testimony of Francis A. Regan.)

Q. Do you belong to any associations or societies of your profession?

A. I do. I belong to the American Institute of Accountants and the Illinois Society of Certified Public Accountants.

Q. What was the education that you had for the practice of your profession?

A. I attended Marquette University, Milwaukee, Wisconsin, from 1934 to 1937; Georgetown University, Washington, D. C., from 1937 to 1940; majored in accounting and received my degree in Business Administration, Bachelor of Science Degree.

Q. From what institution?

A. From Georgetown University.

Following that, in later years, I took postgraduate work at Loyola University, Chicago, and Northwestern University, Chicago. [2860]

Q. And the postgraduate work was all done in accounting fields, was it? A. That's right.

Q. Will you describe the history of your employment and your experience as a professional accountant?

A. From 1937 to 1940, I was employed in Washington as a junior accountant by the Federal Deposit Insurance Corporation. From 1940 to 1951, I was employed as a Special Agent of the FBI.

Q. What was the nature of the work you did when you were employed by the Federal Deposit Insurance Corporation?

Mr. Dixon: Pardon me. What was the year,

(Testimony of Francis A. Regan.)

counsel? 1940 to what? I didn't get the answer to the previous question.

The Court: Read it.

(Answer read.)

Q. (By Mr. Strachan): What was the nature of the work you did while you were an employee of the Federal Deposit Insurance Corporation?

A. With the Federal Deposit Insurance Corporation my work generally concerned the maintenance of records within the offices at Washington related to the liquidation of banks which had been closed and were being liquidated by the FDIC.

Q. What kinds of experience did you have during your [2861] services with the FBI?

A. My work as an agent of the FBI was generally and predominantly in the accounting field. Among the type of cases that I would investigate and did investigate were Court of Claims cases, which in substance concerned suits that had been filed against the federal government, and my work concerned generally an analysis of the records related to the defense of the government in preparation of such suits. These cases generally concerned contracts of various types and the detail work included an analysis of costs as related to the particular contracts in the suits.

Q. Allocating of costs of the claimant to the government contract as distinguished from costs pertaining to other items? A. That's right.

Q. In addition to the Court of Claims cases,

(Testimony of Francis A. Regan.)

what other sort of matters did you work on for the FBI?

A. I also conducted an accounting investigation relative to Renegotiation Act cases. These cases generally resulted from the endeavors by the government and the contractor to reach an agreement as to the amount of profit that was made on contracts. When an impasse resulted or the government and the contractors could not agree as to the amount of profits resulting from a particular operation, the cases were referred to the FBI, where we would make our analysis of the accounts [2862] to determine on behalf of the government the profits or losses that might have resulted from the particular contracts.

In connection with this work, it was necessary to analyze and allocate costs as between contracts and types of operations. Most of these contractors would have civilian work flowing through their plant at the same time these government contracts would be flowing through the plant, so our analysis then would have to include allocation of costs between the different phases of operations of the contractor. [2863]

Q. Are there any other sorts of matters that were assigned to you during your services with the FBI?

A. I also conducted investigation in the bankruptcy cases. Matters that would be referred to the FBI for investigation, which on many occasions necessitated a determination of a depletion in the

(Testimony of Francis A. Regan.)

net worth of a company within a particular or specific period of time. The investigation was for the purpose of determining whether the depletion in net worth was caused by acts which would be a violation of the National Bankruptcy Act. To resolve many of these investigations it was necessary to determine a complete cause or the causes of failure of a company.

Q. Were there any other types of matters that you worked on when you were working for the Government?

A. Investigations also concerned violations of the Federal Reserve Act, the National Bank Act. Generally these were concerned with bank embezzlements and bank frauds, in which through the investigation records would have to be analyzed for the purpose of assembling evidence of the particular violation that may have occurred. It was an analytical study of the accounts for that purpose.

Q. Have you ever had any experience working on antitrust cases?

A. I have, in the accounting phases of antitrust cases.

Q. That is when you were with the Bureau, was it? [2864]

A. When I was with the FBI.

Q. After you left the Federal employment, what experience have you had?

A. From 1951 to 1954 I was employed by a public accounting firm in Chicago under the name of Doty & Dawson. This is a Certified Public Account-

(Testimony of Francis A. Regan.)

ing firm then engaged and still engaged in Chicago in the general practice of public accounting.

Q. In what capacity did you work for Doty & Dawson? A. As a senior accountant.

Q. After leaving Doty & Dawson what did you do?

A. I went into the employ of John A. Lynch & Company in about November of 1954.

Q. What has been the scope of your activities in that employment?

A. Generally our practice is related—is a general accounting practice. We conduct audits, we handle tax matters, and in general, financial inquiries of various types.

Q. You were present and heard the testimony given by Mr. Lynch in this cause, is that correct?

A. That's correct.

Q. He correctly described, did he not, how the work was divided within the Lynch organization, how you did a part and he did a part, primarily?

A. Yes, sir, I heard the testimony, and it was correct. [2865]

Q. And that correctly stated the way in which the work was done and in which each of you cross-checked and confirmed the work of the other; is that correct? A. That is correct.

Q. When did your personal connection with the investigation in this case commence, Mr. Regan?

A. Approximately June or July of 1955.

Q. When and where did you commence work?

A. In our offices in Chicago, Illinois.

(Testimony of Francis A. Regan.)

Q. At what did you work?

A. At that time we had in our offices photostatic copies of records of the plaintiff covering the period from February 1, 1949, through January 31, 1952. These records included the general ledger, the basic record of the company, and the supporting journals, cash receipts, cash disbursement journals, the general ledger. It included work papers, during that period, of the plaintiff, which contained monthly trial balance figures, and in some cases a few computations supporting entries that were made in the company's records during that period.

Q. Aside from the financial records that you described, what other records did you refer to?

A. We had a record entitled the Fruit Receiving Record.

Q. Specifically, did you make any examination of the records of the Chapter XI and Chapter X proceedings in this [2866] case, involving the Winckler & Smith Company, I mean?

A. After I came to Los Angeles.

Q. When was that?

A. Within the past two months.

Q. What other books and records were examined by you in the course of your investigation?

A. In about October, the latter part of October, in order to complete our audit to the extent that we considered additional work necessary, I came to Los Angeles for the purpose of examining supporting records, such as vouchers and cancelled checks of the company. Those records were par-

(Testimony of Francis A. Regan.)

tially produced in October and November, and generally my recollection now is that we received all the records necessary to complete our investigation with the exception of a few vouchers.

After the first of December the general ledger and supporting journals relating to the period prior to 1949 were made available. I examined those.

Q. In particular were there any vouchers or carbon copies of checks issued by Winckler-Smith Company, which were not made available to you on your request?

A. There were some vouchers not made available, yes, sir. [2867]

Q. What vouchers were those?

A. All vouchers made out to Nicholas J. Winckler.

Q. Did you specifically ask to have access to those vouchers? A. I did.

Q. Was access to those vouchers ever given you?

A. No, sir.

The Court: Well, let's not have legal conclusions. Who did you ask and what did you ask and what was the result?

The Witness: I asked Mr. Walker and Mr. Smith. Mr. Smith, Mr. James Smith, as I understand, is in the employ of Mr. Walker. Mr. Walker was the receiver of the bankruptcy estate.

The Court: What did you say to each of them and when?

The Witness: My visit out here had been arranged by the attorneys for the specific purpose

(Testimony of Francis A. Regan.)

of examining these supporting records. When I arrived out here, there was a slight delay and eventually certain records were made available, but they were not all-inclusive. They did not include all the vouchers that we needed.

I prepared a list of the vouchers that I felt were necessary to complete the examination, and on this list particularly were listed vouchers to Rubin, Wallenstein, Parvin, and Winckler.

I presented that list specifically to Mr. Smith. I [2868] asked him in substance for those records, and in substance he told me he would attempt to locate them, and shortly thereafter he did produce records and vouchers made out to Wallenstein, Rubin and Parvin.

I then asked him for the other vouchers which were those made out to Mr. Winckler. Mr. Smith advised me he could not locate them.

I later had a conversation with Mr. Smith, which occurred today, and Mr. Smith told me that those vouchers had been found in the files of Mr. Walker, the vouchers that I had specifically asked for previously and had not been produced.

The Court: Did you have any conversation with Walker about these matters previously?

The Witness: I had several conversations with Mr. Walker about the production of records, yes, sir.

The Court: What did he say? What did you say and what did he say?

The Witness: I asked Mr. Walker originally on

(Testimony of Francis A. Regan.)

first meeting him for the records related to the period 1949 to 1952, the supporting records.

He advised me that they would be available and told me Mr. Smith would arrange for the records to be produced.

I then asked for the records, to make the records available covering the period prior to 1949.

Mr. Walker stated he could not produce those and [2869] would have to leave that matter up to the lawyers in this case.

The Court: Did you have any conversation with Mr. Walker specifically about these Winckler vouchers that you are talking about?

The Witness: No, sir. The reason I did not was that——

Mr. Strachan: Will you speak up so the jury can hear you?

The Witness: I did not have a specific conversation with Mr. Walker relating to the Winckler vouchers, because he had previously referred me to Mr. Smith, who was to produce the records, and I therefore assume that Mr. Smith acted for Walker and was the proper person for me to talk to.

The Court: I don't know, but I think we ought to have some description of this. Where were these records of the Winckler-Smith Company kept previously, when you first came out here?

The Witness: Well, that is a little bit difficult to understand, your Honor.

Mr. Strachan: A little louder, please, so we can hear you.

(Testimony of Francis A. Regan.)

The Witness: I believe some were located in town, some warehouse. The bulk of the records I found when I visited the plant, the former plant of the plaintiff, out at Anaheim.

The Court: Were they in one or two rooms down there? [2870]

The Witness: Principally in two rooms.

The Court: Were they in cabinets or boxes or what?

The Witness: Generally in boxes.

The Court: In other words, they weren't in any order?

The Witness: No. They were in complete disorder.

The Court: Now, subsequently some mass of this material was turned over to the defendants and moved over into some office building of theirs in town, were they not?

The Witness: No, sir, your Honor. As I understand——

Mr. Strachan: I can't quite hear you.

The Witness: When the arrangements were made, I asked for space in which I could examine these records. Mr. Walker and Mr. Smith both told me they did not have the space, and I contacted attorneys in the matter, who then offered to make space available in the Sunkist Building, where these records might be placed.

The Court: Defense attorneys?

The Witness: But as to whether they technically

(Testimony of Francis A. Regan.)

The Witness: Yes.

The Court: All right.

Q. (By Mr. Strachan): You had never made an audit or did any auditing work for a company engaged in processing citrus fruits, had you?

A. No, sir.

Q. What, if anything, did you do to familiarize yourself with the industry and the manner of operation from the raw materials to the finished product?

A. During the course of my examination of the records, and while in Los Angeles, I did visit the plant of the plaintiff, the former plant of the plaintiff, at which time Mr. Smith took me through the plant, generally described the operations of the plant. I visited the plant of Exchange Lemon Products out at Corona.

At all times during our examination of the records whenever in our discretion we felt that we needed more technical knowledge, we called upon the facilities of either Exchange Orange Products or Sunkist, or Exchange Lemon Products to acquaint us with any technical knowledge that we thought, as accountants, we needed to properly examine these accounts.

Mr. Dixon: Mr. Regan, may I interrupt for just a moment? [2874]

You used the word "we" all the time. Was there someone accompanying you? Was Mr. Lynch accompanying you when you made these trips, or are you speaking just for what you, yourself, did?

(Testimony of Francis A. Regan.)

The Witness: I am generally referring to myself, sir.

Mr. Dixon: All right. Thank you.

The Court: It is the editorial we?

Mr. Dixon: I just wanted to be sure.

The Witness: If I use "we" I mean the firm, myself.

Q. (By Mr. Strachan): You made a number of studies which underlay and were directed toward your ultimate allocation of costs as between various products and operations of the company, did you not? A. I did.

Q. Will you tell us what studies and analyses you made in the course of your investigation?

A. One of the analyses made of the accounts of the plaintiff during the period 1949 to 1952 covered the recorded sales of the company. The purpose of this examination was to determine the types of products that the company sold, in order to determine from such an analysis how the company was utilizing its facilities.

This analysis was made for the three-year period on a comparative basis to determine the possibility of any trends in the production facilities of the company, or in [2875] the type of products it handled.

Q. Did you prepare a schedule which shows the sales of products, excluding Florida operations, by years, from the books and records of account?

A. I have.

Q. Is that the document that has been marked

(Testimony of Francis A. Regan.)

for identification Exhibit BO? A. It is.

Mr. Strachan: I will offer Exhibit BO in evidence and ask that copies be distributed among the jurors.

While we are waiting, Mr. Regan, is that schedule marked BO a true and correct statement of the sales, by products, by years, as shown on the books and records of account? A. It is.

Q. (By Mr. Strachan): And that is without adjustment by you, is that correct?

A. Without adjustment by me.

The Clerk: Mr. Strachan, we at the present time only have the one original. That was in that group that you only had one copy at the time. You were going to bring down copies.

Mr. Strachan: I am sorry. Here they are.

The Court: You didn't believe me, apparently.

Mr. Strachan: I don't think that is true, your Honor.

The Court: We are not going to distribute this to the jury. [2876]

If it goes into evidence it will be passed to the jury.

But if we go through all these exhibits on that basis we will never get done. I said we were going to be even-handed on this. The plaintiff's books and records went to the jury; your analysis in opposition went to the jury. Plaintiff's summaries went to the jury, and you will be permitted to make summaries. But every bit of evidence the witness

(Testimony of Francis A. Regan.)

testifies to is not going to be repeatedly passed to the jury.

Mr. Strachan: He hasn't testified to this. He has identified the schedules as being correctly prepared.

The Court: You have identified it, and you have now offered it into evidence; is that right?

Mr. Strachan: Yes, sir.

The Court: It will be received in evidence as Exhibit BO. But I don't propose that every bit of evidence is going to be made up in duplicate to be passed to the jury as we go along.

We discussed this when we started. I thought you understood.

I want to be even-handed on it. I think it is entirely proper, where the plaintiff used its financial statements in that manner, that you could use yours, as you did this morning. But that doesn't mean that we are going to do it with every exhibit that goes along. Do you follow me? [2877]

Mr. Strachan: I understand what you said, yes, sir.

(The exhibit referred to was marked Defendants' Exhibit BO and received in evidence.)

The Court: Nor are we going to record every witness' testimony in writing. This, I think, is entirely proper, a study to go into evidence. You may examine it with the witness, further, and it may be passed to the jury for inspection, but I am not going to permit every exhibit to be duplicated in 14 copies.

(Testimony of Francis A. Regan.)

turned the records over to the defendants or were just utilizing the space, I couldn't say.

The Court: The point is a number of these boxes, some of these records were moved over into that room, were they not?

The Witness: Yes, sir.

The Court: And who had the key to the room?

The Witness: Well, I presume employees of Sunkist. [2871]

The Court: Mr. Walker was not there every day?

The Witness: No, sir.

The Court: I haven't heard it described. I know counsel have discussed it during pretrial and discovery proceedings. What was moved over there? Can you describe it, give some idea?

The Witness: Oh, maybe 20 or 30 boxes of records, not just relating to my particular examination, but I believe to the plaintiff's examination of the records. During the period of and up to the beginning of the trial, there was a representative of Mr. Walker present whenever I examined the records. I understood that was the arrangement at that time, that either Mr. Smith would be present or someone else representing Mr. Walker was present whenever I examined these records.

The Court: These records that were moved over to the Sunkist room were moved over for the convenience of the defendants, not for the convenience of the plaintiffs? You said they were records the plaintiffs were interested in. I may be wrong, but

(Testimony of Francis A. Regan.)

I understood they were moved over for the convenience of the defendants.

The Witness: It was to the convenience of the defendants, but I believe it was also, your Honor, for the convenience of the plaintiffs, too.

The Court: In other words, it was easier for both sides [2872] to get at them in this building than it was to go to the warehouse or to the plant?

The Witness: That's right, sir.

The Court: Then what did you say finally with reference to the orderly way in which the records were boxed or appeared? Were they in an orderly fashion, or was it what you would expect from a company with closed-up business activity?

The Witness: I did testify they were in disorder, but it was a disorder that could result from the lack of operation of the company.

The Court: In other words, it wasn't like going into a going concern where you had an efficient secretary, where you could say, "Tell me where a certain file is kept," and she could put her hand right on it?

The Witness: That's right, sir.

The Court: It presented problems to you, in making your audit and your examination?

The Witness: I believe my problems in that respect were the same as those of Mr. Smith, who was also interested in the records. [2873]

The Court: You, then, both had problems in connection with what you wanted to get out of these records?

(Testimony of Francis A. Regan.)

Mr. Strachan: As I understand it, your ruling thus far is that the document is in evidence, but we can't have duplicate originals marked?

The Court: That's right.

Mr. Strachan: May I ask whether it will be permissible, in order that the jury can follow the testimony, to have copies passed to them, although not marked as duplicate originals, so that they could follow the testimony?

The Court: I am only concerned with time. I am concerned with two things. First, to be even-handed with plaintiff and defendant in this case. I am further concerned, with the great number of exhibits that have been marked here, in the problems that arise on them. I am also concerned with the time in the matter.

If plaintiff doesn't object, and if you think it will speed up the examination, maybe we can do it. But I don't [2878] think this ought to be done with every exhibit. I don't know whether you intend to do it with every exhibit. Maybe I am anticipating. But this matter of summaries or extra copies, and all, is a procedural matter.

Maybe it would speed things up, and maybe it wouldn't.

Mr. Strachan: I think there will be very little time lost, and I think it would facilitate the jury's following of the testimony, because it is a rather complicated comparative exhibit.

If I had not expected copies to be distributed to the jury, I would have had a large copy prepared.

(Testimony of Francis A. Regan.)

The Court: You may tell me the others that you will have similar problems on, but with your assurances, you may pass them to the jury. We will assume that they are all identical originals, and the clerk may mark them.

Mr. Dixon: If the court please, Mr. Hodge informs me that on comparison of these figures there is some discrepancy, in his judgment, between some of the items here, the totals aren't correct.

The Court: That is a matter of cross-examination. The witness says that he made these computations from the books and records.

The Clerk: Do you want to collect the other exhibits up that the jury has?

The Court: Shall we collect the other exhibits from the jury? [2879]

Mr. Strachan: As far as I am concerned they may be, yes.

The Court: All right.

You can finish marking them later, Mr. [2880] Clerk.

Q. (By Mr. Strachan): Mr. Regan, will you refer, please, to Exhibit BO and explain the manner of its preparation and the way in which the information dealt with is reflected on the exhibit?

A. The information set out in this exhibit is an analysis of the actual sales of the plaintiff in each respective year, excluding the Florida operations or the sales made out of the Florida office.

The total sales as appear at the foot of this exhibit

(Testimony of Francis A. Regan.)

are the sales figures unadjusted as appear in the plaintiff's records.

The detail allocation of the sales as between type of product was compiled and determined by me through an analysis of the several sales accounts which make up the total sales.

Q. Now, in comparing the class of products sold from year to year, are there any particular changes in the nature of the operation, significant changes in the operation in your opinion which appear on that exhibit?

A. There are, and the items I noted were this—and this is generally one of the items that would be considered in any cost study—I noted as between the first two years that the volume, dollar volume of sales increased slightly, approximately $100,000. By slightly, I am not inferring that 100,000 is a slight figure, but slight as compared to [2881] the total sales.

I noticed that the items comprising the sales, though, in the two years differ materially, and the material changes appeared to me to be, first, the drop in Valencia orange juice of approximately $500,000. It dropped in the year ending January 31, 1951, over the year ending January 31, 1950.

I note at the same time that there were increases in items such as ades, lemonade, and in concentrate, and also in navel single-strength juice.

Continuing that trend, I noticed a similar drop in the third year as compared to the second as far

(Testimony of Francis A. Regan.)

as the single-strength juices are concerned, and a rise in the proportion of concentrate products.

In analyzing this, I have determined from the records that the drop or the change in the quantity of fruit processed during the three-year period was from approximately 18½ to 19,000 tons in the first year, about 16,000 tons in the second year, and 8,000 tons in the third year. So proportionately in considering that tonnage, there was a marked shift to the concentrate from single-strength juices.

Q. What other studies did you make in connection with your cost analyses?

A. I then examined the raw fruit purchases or the raw fruit receipts that went into the operation which resulted in [2882] the sales to which I have previously testified and as are set out on Exhibit BO.

To make my analysis of the type of fruit that was received, I made my analysis by month and by type of product, determined from the records how many tons of Valencia oranges, navel oranges, grapefruit and lemons were received at the plaintiff's plant in each month of the three-year period.

Q. Did you prepare a schedule showing the tonnage of raw fruit purchased by months for each of the three years? A. I have.

Q. Broken down according to the kind of fruit?

A. I have.

Q. Is that schedule the one that has been marked BP in this record? A. It is.

Mr. Strachan: I will offer it in evidence.

(Testimony of Francis A. Regan.)

Mr. Dixon: I object, your Honor, on the ground of immateriality and no proper foundation laid.

The Court: Overruled. BP in evidence. [2883]

* * *

Q. (By Mr. Strachan): Mr. Regan, will you please explain Exhibit BP and the manner of its preparation?

A. This exhibit was prepared from the records of the plaintiff and in particular a record that I recall as being titled "Fruit Receiving Record." The figures set out in this exhibit are of the figures that appear in the books of the plaintiff.

The Court: You have grouped them by commodity and by year and by month.

The Witness: Generally that was done in the records of the plaintiff.

The Court: Yes, but I mean this exhibit does that. [2885]

The Witness: That's right, sir.

The Court: It was made without adjustment as taken from the records of the company.

The Witness: That's right, sir, except during the course of examining this record, why, we would—I would add each of the columns in the record before I would use the total in order to avoid using an incorrect total. I don't recall specifically right now any particular total I might have corrected. The detail is the same as appear in the records, however.

The Court: What you are saying is you don't

(Testimony of Francis A. Regan.)

guarantee that your totals are the same, there might be an error in some of their totals?

The Witness: Yes, sir. If there is a difference, it would be due to the fact that the record was incorrectly added on the company's books.

The Court: All right. Go ahead.

Q. (By Mr. Strachan): Now, will you point out to the jury and to Judge Carter any matters which have a direct bearing on your studies of cost here with respect to the production of one year as compared to another?

A. Generally, from an examination of the results of this particular analysis, I find that the Valencia orange processing operation was generally restricted from the months of July through November. In other words, those months, those [2886] five months would embrace practically all the Valencia production of the plaintiff.

I determined through this analysis that while the total tons processed by the plaintiff changed from one year to the next, the total change was not representative of the change that occurred in the particular type of product that was processed.

I found that during this year the largest——

Q. During which year, Mr. Regan?

A. During the three-year period covered by this exhibit the largest receipts of Valencia oranges occurred during the first year when the total of 12,739.98 tons were received at the Winckler & Smith plant.

This tonnage of Valencias decreased in the sec-

(Testimony of Francis A. Regan.)

nd year to an amount that was approximately 66 per cent or two-thirds of the previous year.

In the final year, the year ending January 31, 1952, there was a corresponding decrease in the amount of Valencia oranges. [2887]

Q. By that do you mean that the year ended January 31, 1951, was a year in which there had been about a one-third reduction in the quantity of Valencias purchased as compared with the prior year? A. That is right.

Q. And that taking the next succeeding year, the year ended January, 1952, there was, again, another 33⅓ per cent decrease in the number purchased?

A. That is right. And in that second year the decrease in tonnage of Valencias was in part offset by an increase in navel tonnages, and to a very minor extent by an increase in the lemon and grapefruit tonnage.

Q. Did you, likewise, make a study of the distribution of the raw fruit purchases among various sources of supply? A. I did.

Q. Did you prepare a schedule of that showing purchases of the principal varieties of fruit by sources of supply and by year? A. I did.

Q. Is that the schedule that is identified in this record as BQ? A. It is.

Q. Was that prepared by you from the books and records of account without adjustment?

A. It is prepared from an analysis of the ac-

(Testimony of Francis A. Regan.)

counts. [2888] These figures are not set out in these totals in the books.

Q. But they are taken from the books and then combined, is that correct?

A. That is right, sir.

Q. Directly from the books? A. Yes, sir.

Mr. Strachan: I will ask that that exhibit be received in evidence.

Mr. Dixon: A general objection.

The Court: The objection is overruled. It will be received in evidence.

* * *

Q. (By Mr. Strachan): Will you describe the manner of preparing Exhibit BQ and explain the indications appearing on the face of it?

A. This exhibit was prepared through an examination of the fruit receiving records of the company, along with the [2889] cash disbursements records of the company. The purpose of this exhibit was to determine where the plaintiff obtained its fruit during the three-year period. And it is a further analysis of the total of fruit received as appears in total on Exhibit BP. BP analyzes the total fruit received by month. BQ then presents that total analyzed by source of supply.

Q. Will you point out what in your opinion are significant indications on the face of that exhibit?

A. Directing my attention to the percentages that are set out on this exhibit, I find that as to Valencia oranges the fruit received from Morgan Ward during the three-year period represented the

(Testimony of Francis A. Regan.)

major part of the Valencia orange receipts of the company. The lowest percentage being in the first year, in which 73.28 per cent of the total supply was received from Morgan Ward.

Q. The classification "Other" that appears on the tabulation means sources other than either Morgan Ward or Exchange; is that correct?

A. That is right, sir.

Q. That would represent any purchases made direct from growers or from other so-called independent sources?

A. Other than through Morgan Ward and Exchange. I believe that generally, while this exhibit sets out the source of purchases by source as to the tonnage involved, the records of the company for the last of the three years carried an [2890] analysis of the purchases as to dollar amount by source. The records did not present this type of detail in the previous years, the general ledger itself. So going to the supporting records I then built up the totals as appear in the other years, in order to compare it with the third year. [2891]

* * *

(The following proceedings were had outside the hearing and presence of the jury:)

Mr. Strachan: Judge, I thought when I asked to speak to you without the jury present perhaps we could have some sort of understanding about these two exhibits, BS and BT, and discuss this so we wouldn't have a scene before the jury.

What I propose to do is to have this witness show that he has made a computation of the profit or loss Winckler & Smith would have had if they had obtained fruit, processed and sold the fruit on the same proportional terms as the TreeSweet contract. That some proportional terms is, I believe, the allegation that is made in the complaint as to what the loss or profit is computed from.

It is our position and our accountant's computation is based on the proposition that in order to obtain the fruit and pay for it and make the same return for it that TreeSweet did, it is necessary to take into the computation of profit or loss the oil derived from the processing and returned as part of the purchase price, so to speak.

His testimony will show that his computation differs from Mr. Hodge's in that respect. He will explain why it is that he included that and how he computed the amount of cost which should be charged to Winckler-Smith's hypothetical operation in order to make it comparable to the TreeSweet operation. [2892]

Then I will eventually ask him whether he has prepared a schedule showing the computation as he made it, that is Exhibit BS, with the two attached pages showing the schedules of supporting analyses, computations, and I would then offer it in evidence.

I would like also to offer to have it distributed to the jury at that point. [2893]

The Court: Let me say this. I have a lot of respect for these two young men here. Outside of their intelligent and good-looking appearance, their serv-

ice with the FBI is a good stamp of indicia. But no one is infallible, and these men aren't. They already misled you, or somebody here, in the contention that you had in connection with Hodge's exhibit. I assume they had some part in it. And, as I said before, I claim to be no specialist, but it seemed to me that I could see that in the little study I gave it on the bench.

Mr. Strachan: That wasn't their responsibility. It was a blind spot I had.

The Court: It is their responsibility, it seems to me, if they were paid $39,000 to date, and are going to be paid additional money, to advise and keep counsel in line. And we don't claim to be accountants, Mr. Strachan. It is all we can do to keep up with the cases that come down, let alone accounting principles. You are approaching another similar problem.

You talk about a comparison with TreeSweet. There is no comparison with what TreeSweet made or Winckler & Smith made, in this problem.

The problem was what would Winckler & Smith have made had they had 12,000 tons available. Now, whether you would have given them the 12,000 tons, because of this oil computation and other things, is another problem. [2894]

I can't keep you from making computations, but if this exhibit is used I will instruct the jury that it is not to be considered as a rebuttal exhibit, as permitted by the court to be made with reference to 69. Because it isn't. It would only lead to confusion on that score. Because you are not making a

comparison between what Winckler & Smith would have made and what TreeSweet would have made. The point was raised by the contention, what would Winckler & Smith have made, and it was predicated on the assumption that they could have got the 12,000 tons.

Now, you can work on that assumption, and you can make your computations on oil, and that assumption might be destroyed by a showing that the small amount of oil that Winckler & Smith would get would destroy any value on the assumption, or it would have an impact on that point.

But it is not the type of exhibit that the jury were told would be forthcoming. If it comes in, then it is confusing, because it is on a different basis.

If you want to make some computation from the standpoint of what Sunkist would have made by giving them these 12,000 tons, and that is really in a way what you are slanting at here——

Mr. Strachan: That is what we are trying to get at.

The Court: Then you have it tied in with what Winckler & Smith would have made or lost. So you are confusing the [2895] two things.

Mr. Strachan: Perhaps I haven't made myself clear. This is a computation of what Winckler & Smith would have made had they obtained fruit under the same proportional terms as TreeSweet obtained fruit, and had they processed it and incurred not the TreeSweet costs, but Winckler & Smith's costs of processing. This is what this and Exhibit BT are aimed at.

The only thing in common here is that we are determining the cost of raw fruit to Winckler-Smith on the same comparable basis, directly comparable basis as the cost to TreeSweet. But we are not determining here what TreeSweet would have made. We could find that out by going to their books. We are finding out what Winckler-Smith's profit or loss position would have been on the 12,000 tons had they paid for the raw fruit just what TreeSweet yielded for it in kind and in dollars.

The Court: Of course that wasn't and is not plaintiff's contention.

Plaintiff has counted on, has complained of two contracts. One to Silzle and one to TreeSweet. The evidence shows that the return of oil, the net return to Sunkist of those two contracts were different. They weren't the same. In other words, Sunkist was giving contracts to competitors, one of which brought in Sunkist a larger return than the [2896] other one, and the plaintiff's position is had we had fruit available, and assume that our oil return wasn't the same, either, what would we have made.

On that kind of a basis, rebutting Exhibit 69, which I let in, and availing yourself of a privilege which I gave you of offering a rebuttal exhibit to 69, and overlooking for the minute that at the time that arrangement was made it was to be based upon this cross-examination—and this of course would not be that, but passing that up—a comparable exhibit to 69, as far as 69 went, would take into account income Winckler & Smith got from oil and what it cost them to process the oil. It would not take into

account income Winckler & Smith got from oil and what it cost them to process the oil. It would not take into account what Sunkist would have got, or how good the deal was to Sunkist.

Now, that is the confusing part of it, and I don't intend to have the jury confused on that point.

If you want to make some calculation as to what Sunkist would have got from the fruit, go ahead and make some computation. [2897]

Mr. Strachan: That is what that is, your Honor.

The Court: But it isn't. Then you have mixed up in here Winckler-Smith's selling costs and their additional expenses and what-not, and you wind up with the net result as a loss to Winckler & Smith.

Mr. Strachan: All we have done here in that computation was to take as the cost of raw fruit the same price which TreeSweet in effect paid for the juice and the oil as the cost of the fruit, and then we have made adjustments to that by applying Winckler & Smith's operating costs. We have also given them credit for the oil return which would have been realized from their method of operation.

The Court: Then it is not in rebuttal to what plaintiff attempted to prove by 69.

Mr. Strachan: I will say it is rebuttal in the sense that they are two different computations with two different underlying theories. But on direct rebuttal of 69, I propose to have the witness show where the can, carton and label costs have been understated, the selling costs have been understated, where the general and administrative costs have been understated. Those will be direct rebuttal.

The Court: I will instruct the jury, if you use

it, it has no relationship to 69 and it doesn't comply with the offer made you.

What is plaintiff's view on this? [2898]

Mr. Dixon: May it please the court, I think I have previously stated the position of plaintiff with reference to this exhibit, which again is that the item H, oil factor, attached to this exhibit, has no place in the exhibit insofar as the plaintiff is concerned. Your Honor has already stated the basis under which 69 went into evidence and the contention of the plaintiff in this case with reference to the TreeSweet contract, which again is that the plaintiff should have had oranges made available to it on the comparable basis to that on which they were made available to TreeSweet.

Now, TreeSweet did not buy the oranges apparently nor did they buy any oil, but they did get, on the computation in 69, oranges for processing into juice, and which, when processed into juice and canned ready for the market, with all costs paid therefor, exclusive of the oil and peel, were around. I have forgotten the amount, about thirteen or fourteen dollars a ton.

Now, the additional factor of the oil, of course, added to that will bring the return in a sense to Exchange Orange under the TreeSweet contract to about $24 or $25 a ton, whatever the amount is, but that is not the basis of the comparison which the plaintiff has made in this case and is not involved in the claim of the plaintiff with reference to like treatment to that given TreeSweet by Exchange Orange under the contract. [2899]

Now, the fruit figure, it is true, does not show—I mean in 69—that the net result was that oranges that would have otherwise cost any other buyer $44 a ton, if they had bought them, were made available to TreeSweet, if TreeSweet had bought them on that assumption, the same oranges, at $25 a ton. That is an entirely different proposition.

The plaintiff contends with reference to the Silzle contract, for example, that the defendants made some oranges available to Silzle at $22 a ton which, of course, included oil and the peel, but there was no oil and peel made available here to TreeSweet under the TreeSweet contract and it is not in the picture.

To complete the comparison, the plaintiff added the additional factor and ran the oil through to show what the whole fruit would have been or what it would have been sold for by Sunkist to TreeSweet if there had been an actual clear-cut sale of the oranges.

Then we go on from there to show that——

The Court: That is because on those exhibits the comparison was to be made between $40 a ton for the whole oranges——

Mr. Dixon: That is correct, your Honor.

The Court: And TreeSweet's and Silzle's deal for the whole oranges.

Mr. Dixon: For the whole oranges.

The Court: I am satisfied with my analysis of this. You [2900] are nicely muddling two problems. I don't think it is done intentionally, but it definitely muddles two problems. You will not be pre-

cluded from showing what you estimate Sunkist's return would be had it sold to Winckler-Smith and arguing to the jury that is why you didn't sell to Winckler-Smith. That is your point.

But using this 12,000 tons here and winding up with what you figure to be a loss figure for the net figure of that operation completely muddles two problems.

Mr. Dixon: May I suggest further, your Honor, that this oil factor which is referred to in this exhibit would not be admissible in my judgment, certainly, and plaintiff would object to it under any theory until the defendant had previously indicated by testimony from the stand of a witness from Sunkist that they knew of this difference and that that was the reason they did not make them available, but they can't do that, I know they can't and they know it. So this would be getting in through the back door again something they couldn't get before the jury by direct evidence.

If this exhibit is going to be used at all, the paintiff would have to object to it, at least to the extent that the H oil factor part of it be removed from the exhibit for the reasons previously given.

Mr. Strachan: I wonder if it would clarify the matter at all if I would ask this question? What if any return does [2901] the plaintiff assume Winckler & Smith would have made on a processing arrangement if it had had one with respect to the oil? Anything? A dollar? $2.00? $3.00?

The only thing that enters into their computation is how much they would have returned for juice.

Mr. Dixon: That is correct, because we are comparing the TreeSweet contract, counsel.

Mr. Strachan: Let's say $170,000. That is less than $15 a ton. The complaint alleges an acquisition of fruit at proportionally equal terms with TreeSweet.

The Court: This other point I hadn't thought about; but I think counsel has a point, Mr. Dixon has a point there. In other words, you are accused of certain acts which caused damage. Now, you can't defend against those acts by what you may decide after you did the acts would have been the effect if you had done or not done something before.

For instance—well, I am trying to think of a simple analogy. I will have to think about that one. But I think counsel has a very definite point there.

Unless you are prepared to prove that you turned down Winckler-Smith's request because of that reason, then I don't think that computation of the accountants is admissible, and I think it comes in this way in the back door when it otherwise couldn't come in the front.

Mr. Strachan: This comes in on the question of damages. [2902] They say if they had had this, they would have made a profit. Now it appears that they figure the only cost of the fruit to them would have been the cost of the juice end of it, because nothing else enters into their computation. That results in their figuring a cost of raw materials of $172,000, which is less than $15 a ton on the 12,000 tons, whereas their own exhibits show that the TreeSweet deal, with which they want to be com-

pared, was a deal under which all fruit cost Tree-Sweet $25 a ton.

Mr. Dixon: We don't make that contention at all, your Honor. I don't see how counsel constantly seems to be confused with reference to the contention of the plaintiff in this case, because that is not the contention of the plaintiff. I think we are entitled to use and to show the effect of the discrimination. Now, they take the oil in as part of the deal to Sunkist. In spite of that fact TreeSweet, even under that arrangement, was getting $44 oranges, and that is already in this record, your Honor, and that is the purpose of its being there, as against a sale price of the oranges, if they sold the oranges to TreeSweet, of $24 or $25 a ton. It would still be discriminatory. [2903]

But that isn't the contention of the plaintiff with reference to the TreeSweet contract.

The contention is that oranges would be made available, and that is the language I want emphasized, made available under an arrangement comparable to that which they were made available to TreeSweet.

And I don't care whether you call it a sale or processing contract or what you call it. The fact remains that they were made available to Tree-Sweet.

Our Exhibit 69 shows the basis under which they were made available, and our computation of what the plaintiff could have realized on a comparable deal. There is nothing whatsoever that is related

to the price of oranges; the $25 oranges to the plaintiff is another question.

We have no computation in this case thus far that deals with the processing of $25 oranges, and I don't know whether they could have even been processed at $25 a ton in 1951, at a profit.

But if that is what he is trying to prove, that is not the purpose of the comparison, your Honor, that we have set forth in Exhibit 69, and that is not the purpose of Mr. Hodge's testimony, on that exhibit.

The Court: I am satisfied in my own mind, counsel.

What do you want to do to make a record? Do you want to call this witness and in general terms, without going [2904] into this matter by name and so forth, lay a general foundation that this exhibit was made from the records——

Mr. Strachan: I think we might as well have the jury. I didn't want to have any unnecessary colloquy in the presence of the jury. I was going to say that I think your Honor indicated what your present intention is. I would like to go ahead. I would like to add that I would like to have it understood that in the event your Honor should make a statement to the jury that this exhibit was not rebuttal of Hodge, I think that might give a wrong impression.

The Court: What do you want to do—go ahead before the jury identifying BS?

Mr. Strachan: That's right.

The Court: I am just suggesting, if you want

to do it before the jury, I want you to lay a foundation in general terms, to start with, sufficient to make your offer, namely, that this has figures on it taken from books of this or that company, and so forth; that he has made a computation, without describing what the theory of this is; and then you offer it, and I am going to sustain an objection to it.

If you want to do it before the jury, all right. Or if you want to do it out of the presence of the jury, you may.

Mr. Strachan: I think it would take a little more time, and I am going to lead up to that gradually.

Mr. Dixon: May I make this suggestion for whatever it [2905] is worth, your Honor?

If H Oil Factor is deleted from this exhibit, that is the part that the plaintiff is objecting to.

The Court: That is all that concerns me in this comparison. But it appears as a part of the third sheet, numbered 2, and it also appears on the first page.

Mr. Dixon: That is correct. I hadn't noticed that, either, your Honor. I am sorry.

Mr. Strachan: I missed something there, your Honor.

The Court: Mr. Dixon said that if this computation on the oil factor were eliminated he has no objection.

Well, the computation of the oil factor is half of the last sheet, but it also appears on the first sheet.

Let's get the jury down.